(25,069)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 786.

H. S. McGOWAN, ERICK LINDSTROM, AND J. P. COYLE, APPELLANTS,

vs.

COLUMBIA RIVER PACKERS' ASSOCIATION AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 2396

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Appellees.

VOLUME I.

(Pages 1 to 352, Inclusive.)

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

G. C. FULTON, Esquire, Astoria, Oregon,
Solicitor for Appellant.

JOHN C. WELSH, Esquire, South Bend, Washington;

MARTIN WELSH, Esquire, South Bend, Washington;

CHARLES W. DORR, Esquire, Colman Building, Seattle, Washington; and

HIRAM E. HADLEY, Esquire, Colman Building, Seattle, Washington,
Solicitors for Appellees. [1*]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,
Defendants.

Praecipe for Record on Appeal.

To the Clerk of the Above-entitled Court:

You are hereby directed to take a transcript of record in the above-entitled cause to be filed in the

*Page-number appearing at foot of page of original certified Record.

United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers, to wit:

(1) Amended complaint.
(2) Bond for injunction.
(3) Restraining order.
(4) Answer and cross-complaint of defendant H. S. McGowan.
(5) Demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
(6) Order overruling demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
(7) Answer of plaintiff to cross-complaint of defendant H. S. McGowan.
(8) Replication of defendant H. S. McGowan to plaintiff's answer.
(9) Stipulation between counsel as to the demurrer to answer and cross-bill of defendants Lindstrom and Coyle and pleadings of such defendants.
(10) Petition of plaintiff to dismiss this action.
(11) Opinion of Court on such motion to dismiss action.
(12) Order denying petition of plaintiff to dismiss.
(13) Order allowing plaintiff to file supplemental bill of complaint.
(14) Supplemental bill of complaint of plaintiff.
(15) Answer of defendants H. S. McGowan to plaintiff's supplemental bill of complaint.

[2]

(*19*) Order appointing C. D. Savery, Special Examiner.

(20) Memorandum of decision of Judge Donworth, of date January 6, 1912.

(21) Decision of Judge Donworth of date January 24, 1912.

(22) Interlocutory decree of date February 5, 1912.

(23) Order appointing M. A. Langhorne, Special Master.

(24) Report and findings of special master.

(25) Plaintiff's exceptions to report and findings of special master.

(26) Motion of defendants for confirmation of report of special master.

(27) Decision of Judge Cushman, of date August 12, 1913.

(28) Final decree.

(29) Transcript and evidence.

(30) Petition and order for appeal and order fixing the amount of appeal bond.

(31) Assignments of error.

(32) Bond on appeal and approval thereof.

(33) Citation on appeal and proof of service thereof.

(34) Order certifying original exhibits.

(35) Order extending time in which to prepare, file and serve transcript on appeal.

G. C. FULTON,
Attorney for Plaintiff.

Due service of the within praecipe is hereby accepted this 3d day of Dec., 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

In the Circuit of *the United States for the Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Defendants.

Amended Complaint.

The above-named plaintiff complaining of the above-named defendants, by this its amended complaint filed herein by leave of the Court first had and obtained, for its cause of action against said defendants alleges,

I.

That plaintiff is now and during all of the days and dates herein mentioned was a corporation duly organized and existing under and pursuant to the laws of the State of Oregon, and duly licensed as such in ac-

cordance with the laws of the State of Oregon, and was and is a citizen of the State of Oregon. That the office and place of business of this plaintiff is now and at all times has been at the City of Astoria in the County of Clatsop in the State of Oregon.

That this plaintiff is and was at all times herein mentioned duly authorized and empowered by its articles of incorporation to own, possess, and acquire real estate and personal property; and to engage in the business of taking and catching and dealing generally in salmon and other fish for trade and profit; and in the operation of all kinds of fishing appliances in the Columbia River and the waters thereof and [4] elsewhere; and to lease and sell real estate and interest in real estate; and to engage generally in the business of taking, catching, handling, packing, and preserving salmon and other fish and the marketing thereof for profit; and is and has been for many years past engaged in such business at Astoria, in Clatsop County in said State of Oregon.

II.

That long prior to the institution of this action and of the grievances herein complained of, to wit, on the 9th day of July, 1906, this plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation duly certified to by the Secretary of State of Oregon, who was and is the custodian of the same according to the laws of the said State of Oregon, and who was and is authorized to issue certificates thereof, according to the laws of the State of Oregon, and the same was duly attested by the Secre-

tary of State of the State of Oregon under his hand and seal of the State of Oregon.

And on the same date the plaintiff filed in the said office of the Secretary of State of the State of Oregon a writing signed by the vice-president of plaintiff, one of the chief officers of plaintiff, and attested by the plaintiff's corporate seal, wherein and whereby this plaintiff therein constituted and appointed R. A. Hawkins of Ilwaco, Pacific County, in said State of Washington, its agent to accept service of process in any action or suit pertaining to the property, business, or transactions of this plaintiff within the State of Washington, or in which plaintiff should be a party; which said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, to wit, Ilwaco, Pacific County, State of Washington, [5] together with the office and place of business of plaintiff where the business of plaintiff should be carried on in said State of Washington, to wit, Ilwaco, Pacific County, State of Washington; and in all respects duly and fully complied with all of the laws of the State of Washington relating to and governing foreign corporations transacting business in said State; and was thereupon duly authorized to transact any and all business in said State; and according to the laws of the State of Washington was authorized and permitted to generally do and perform every act and transact every kind of business within said State of Washington in the same manner and to the same extent as corporations incorporated and organized under the laws of said State of Washington are authorized to do by the laws of such State.

This plaintiff further alleges that a majority of its stock is owned by citizens of the United States.

III.

That the defendants are and each is and during all of the times herein mentioned were actual citizens and residents of the State of Washington and each of said defendants resides and did reside during all of the times herein mentioned in the County of Pacific in said State of Washington, and within the jurisdiction of this Court, and within the Western District of Washington, and within the Western Division thereof.

IV.

That long prior to the institution of this suit and the grievances herein complained of, the United States of America was and still is the owner in fee of that certain tract of land situated and located within the County of Pacific in the State of Washington, the same being an island in the Columbia River near the mouth of said river, which was and is generally known [6] and named upon all official records, maps, and plats as Sand Island; together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; which said island has been in existence for many years and is universally known and described as Sand Island.

That said Sand Island was, by proclamation of the President of the United States, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservation and the same has ever since been held

and reserved as such by the United States.

That, pursuant to an act of Congress, approved July 23, 1892 (27 Stat. 321), granting authority to the Secretary of War, in his discretion, to lease for a period of not to exceed five years such property of the United States under his control as should not for the time be required for public use, the Secretary of War of the United States on the first day of May, 1908, said Sand Island then being under the control of said Secretary of War and then not required for public use, by writing duly executed and approved in the manner provided by law, duly leased to the plaintiff for a good and valuable consideration the following portion of Sand Island, same being designated on the maps and plats of the Government survey as Sites No. 2 and 3, for the term of three years from said date, together with the tide lands, water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River; which said portion of said island so leased aforesaid and being Sites No. 2 and 3, was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark [7] due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a

point on said low-water line that would intersect a north and south line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked.

That upon the execution and delivery of said issue aforesaid this plaintiff immediately entered into the possession of said premises and of the whole thereof.

That said Sand Island and the premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark consists of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no minerals or phosphates of any kind. That the bed of said river below said low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites 2 and 3 aforesaid are on the south side of said Sand Island and are on the north shore of the main ships' channel of the Columbia River and within the jurisdiction of this Court and within the Western District and Western Division thereof, and that the main channel of the Columbia River washes said shore of said island where said waters are navigated by all the ocean-going vessels, and all the vessels that carry the commerce of Washington and Oregon navigate such waters.

That said premises are and at all times have been of great value for the right of fishery thereon and the right to [8] haul and land seines thereon and in

front thereof, and to operate seines from the shore into the waters thereof and to haul same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river.

That said premises were leased to this plaintiff by the said United States through the Secretary of War for the sole purpose of being used and employed as a fishery and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores.

This plaintiff further alleges that, under the laws of the United States, the said waters are required to be kept free from obstructions and that by virtue of said laws and said lease aforesaid plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed; and is entitled of right to the free, unobstructed ingress to and egress from said premises; and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores.

Plaintiff further alleges that heretofore and on the 30th day of June, 1908, pursuant to the laws of the State of Washington, this plaintiff duly applied to the Fish Commissioner of the State of Washington for a license to operate three seines upon said Sites 2 and 3 aforesaid, and then and there paid the said Fish Commissioner the license fee exacted by the said Fish Commissioner and the laws of the State of Washington, to wit, the sum of $15.00 for license *N.* 2391 and $15.00 for license No. 2392 and $15.00 for

license No. 2393. Thereupon said Fish Commissioner [9] duly issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively 2391, 2392 and 2393; and thereupon this plaintiff was entitled of right to operate three seines in the waters of the Columbia River within the State of Washington from said date and for the period of one year thereafter.

That, on the second day of July, 1908, whilst said lease was in full force and effect, this plaintiff entered upon the said leased lands aforesaid, namely said Sites 2 and 3 on said Sand Island, together with its three seines and seining outfit, having made preparation to engage in the business of employing said leased premises in the operation of said seines for the purpose of taking and catching salmon fish.

That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and under the same lease aforesaid, when the defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in

the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting [10] of large stones to which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say, that each of said obstructions consisted of a large stone or stones of great weight

to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore. [11]

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress out from said premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any particular use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and are and each is an obstruction to the navigation of said river.

This plaintiff further alleges that it has expended for the purchase of seines and appliances necessary to conduct seining operations on said premises and

shores fully $15,000.00, and has employed and now has in its employ and had in its employ at the institution of this action thirty-four men, and was and is keeping and caring for twenty-four horses, all necessary to be employed and used in operating *and* seining grounds; and plaintiff was and is required to expend each day to maintain said outfit at least $200.00. That plaintiff is required to pay as rental for said premises the sum of $5,175.00 per annum. That the salmon fish on the Columbia River are of great value and ascend the river only at certain intervals during each year, and are now in the waters of said river in great numbers, and if the defendants are permitted to maintain said obstructions, plaintiff will not [12] be able to use said grounds or employ its seines and will be irreparably damaged; that the damages will amount to many thousands of dollars, but it is absolutely impossible to measure such damages by money, for it is impossible to ascertain how many fish plaintiff would catch.

That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent from ingress to and egress from said premises.

That an emergency exists and plaintiff is entitled to a preliminary injunction enjoining each of said defendants from maintaining said obstructions and from placing any obstructions in front of said prem-

ises or in the waters adjacent thereto, or from interfering with plaintiff's ingress to and egress from said premises and from interfering with the operation of seines on the shores of said sands and from interfering with the landing of said seines.

That the obstructions herein complained of were placed in said waters without any authority from the Secretary of War, or any officer of the Government of the United States, and were placed in said waters in violation of the laws of the United States, and of the State of Washington, and were placed therein as aforesaid for the sole purpose of harassing and annoying plaintiff and preventing plaintiff from ingress to and egress from said premises aforesaid.

WHEREFORE by reason of the premises plaintiff demands judgment and decree, [13]

First: That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein enjoining and restraining said defendants and each of them, their servants, agents, and employees and all persons acting by, through, or under them from placing in any of the waters of the Columbia River in front of or adjacent to said Sites No. 2 and 3 on said Sand Island, or from maintaining in front of said premises in said waters any obstruction whatever, particularly the obstructions now there *maintain* as hereinbefore mentioned, and from any interference with the free and uninterrupted ingress to and egress from said premises.

Second: That upon the final hearing herein the injunction be made perpetual, and that all obstructions placed in said waters in front of said premises

be abated and the defendants be required to remove the same, and upon their failure to do so that plaintiff be entitled to do so at the cost and expense of said defendants.

Third: That plaintiff have such other and further judgment and decree in the premises as to this Honorable Court may seem equitable and just.

G. C. FULTON,
Attorney for Plaintiff.

State of Oregon,
County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled action; and that the foregoing Amended Complaint is true, as I verily believe.

SAMUEL ELMORE. [14]

Subscribed and sworn to before me this first day of August, 1908.

[Notarial Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 28, 1909.

State of Washington,
County of Pacific,—ss.

Due service of the within Amended Complaint is hereby accepted in said county and State, this 5th day of August, 1908, together with a copy thereof.

WELSH, WELSH & O'PHELAN,
Attorneys for Defendants.

[Endorsed]: Amended Complaint. Filed U. S. District Court, Western District of Washington.

Aug. 11, 1908. A. Reeves Ayres, Clerk. ————, Deputy. **[15]**

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Bond for $2,000.00 for Injunction.

The above-named plaintiff having instituted a suit in the above-entitled court asking for a preliminary injunction enjoining and restraining the above-named defendants from the doing of certain acts and things in the complaint mentioned, and the said Court being advised that an emergency exists and has granted said restraining order and has fixed the bonds therefor at the sum of $2,000.00;

NOW, THEREFORE, we, Columbia River Packers' Association, as principal, and The United States Fidelity & Guaranty Company as surety, hereby undertake that the above-named plaintiff will pay all damages and costs which may accrue by reason of the injunction or restraining order, not exceeding, however, said sum of $2,000.00.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7th day of July, 1908.

COLUMBIA RIVER PACKERS' ASSOCIATION,

By SAMUEL ELMORE,
Vice-president.

THE UNITED STATES FIDELITY AND GUARANTY CO.,

[Seal of Surety Co.] By DOUGLAS R. TATE,
Its Attorney in Fact.

[Endorsed]: Filed & Approved July 7, 1908. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Deputy. [16]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Bond for $10,000.00 for Injunction.

WHEREAS the above-named plaintiff has instituted an action in the above-entitled court against the above-named defendants praying, among other things, for an injunction and restraining order *pen-*

dente lite; and said injunction having been heretofore issued upon an order requiring the said defendants to appear before the above-entitled court at the court-rooms thereof at Seattle, King County, Washington, on Monday, July 20, 1908, at 10 o'clock A. M. and show cause why such preliminary injunction should not continue in force. And said parties having appeared before said court at said time and such proceedings were then and there had that the said hearing was continued until the first Monday in September, to wit, Monday, September 7, 1908, at the court-rooms of the above-entitled court; and said preliminary injunction was by order of the Court continued in force until said date and until the further order of the Court, and the plaintiff was required to give another bond in the sum of $10,000.00 for a continuation of such injunction;

NOW THEREFORE we, Columbia River Packers' Association, a corporation, plaintiff, and United States Fidelity and Guaranty Company, as surety, hereby undertake that the above-named plaintiff [17] will pay all damages and costs which may accrue to the defendants by reason of said injunction or restraining order, not exceeding however the sum of $10,000.00.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 21st day of July, 1908.

[Seal of Columbia River Packers' Assn.]

COLUMBIA RIVER PACKERS' ASSOCIATION,

By S. ELMORE, [Seal]
Vice-president.

[Seal of Surety Company]

THE UNITED STATES FIDELITY AND GUARANTY CO.,

DOUGLAS R. TATE, [Seal]

Attorney in Fact.

[Endorsed]: Filed July 24th, 1908. A. Reeves Ayres, Clerk. [18]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Restraining Order.

Now on this day came on to be heard the above-entitled cause before the above-entitled court on the application of the plaintiff for a preliminary injunction. And the Court, on reading the bill of complaint filed by the complainant herein, and on motion of G. C. Fulton, Esq., its solicitor.

IT IS ORDERED BY THE COURT that this cause be and the same is hereby set for hearing before this Court at Seattle, King County, Washington, on the 20th day of July, A. D. 1908, at ten o'clock A. M. at the courtroom in the above-entitled court;

and the said defendants are hereby required to then and there appear to show cause, if any, why an injunction should not be issued enjoining and restraining said defendants from the doing of the acts and things complained of in complainant's complaint;

On the application of said complainant for an injunction *pendente lite,* it appearing to the Court that an emergency exists, and that the complainant is entitled to such injunction, and the said complainant having filed herein its bond with sufficient surety approved by the clerk, in the sum of Two Thousand Dollars ($2,000);

IT IS FURTHER ORDERED BY THE COURT that the said defendants and each of them, and all persons acting by, through or under them, their servants, agents and employees, are hereby [19] enjoined and restrained until the further order of the Court in the premises, from in any manner interfering with the free ingress to and egress from, and from placing or maintaining any obstruction or anchor or killock, or any timber, log or appliance whatever, that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Numbered Two (2) and Three (3) on Sand Island in the County of Pacific in the State of Washington, the shore line of said Sites numbered (2) and Three (3) being described as follows:

Beginning at a point 4000 feet easterly along low-water line from a point on low-water line due west of United States Monument No. 4 erected on Sand Island by the United States Government Survey;

thence easterly along the said shore line to east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that will intersect a north and south line 781 feet east of United States Monument No. 6 on said Sand Island. That Sand Island referred to herein is the island that is generally known and recognized on all official records, maps and plats as *San* Island, and is an island located on the Columbia River opposite the town of Ilwaco between the County of Pacific in the State of Washington and the County of Clatsop, in the State of Oregon, and on the north shore of the main channel of the Columbia River.

Dated July 7th, 1908.

C. H. HANFORD,
Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed restraining order on the therein named H. S. McGowan, J. P. Coyle, and Erick Lindstrom at McGowan, Wash.; and Walter Bussey and L. N. Stensland, whose true name is I. N. Stensland, at Chinook, Washington, by handing to and leaving a true and correct copy thereof with H. S. McGowan, Erick Lindstrom & J. P. Coyle at McGowan, [20] Wn.; and Walter Bussey and I. N. Stensland personally at

Chinook, Washington, in said District on the eighth day of July, A. D. 1908.

C. B. HOPKINS,
U. S. Marshal.
By J. F. Statter,
Deputy.

Dated at Tacoma, Washington, on this 9th day of July, A. D. 1908.

Marshal's fees, $10.00.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Jul. 7, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [21]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Answer of Defendant, H. S. McGowan, in Equity.

The defendant, H. S. McGowan, now and at all times hereinafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections, in the plaintiff's said

amended bill of complaint, in the above-entitled action contained, for answer thereto says, admits, alleges and denies as follows:

1.

This defendant admits that plaintiff is now and was at all the times mentioned in its amended complaint, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it was and is a citizen of said State and that its office and place of business is in Astoria in said State; and this defendant admits that plaintiff is now and was at all of the times mentioned in plaintiff's amended complaint authorized and empowered by its articles of incorporation, to own, possess and *acquit,* real estate and personal property.

This defendant denies that plaintiff is now and was at all of the times in its amended complaint mentioned or that it is now or that it ever was authorized and empowered or authorized or empowered by its articles of incorporation or otherwise to [22] engage in the business of taking and catching or of taking or catching and dealing generally or otherwise in salmon and other fish or in salmon or in other fish, for trade and profit or for trade or profit. This defendant denies that plaintiff is or was at any time whatever or at all authorized and empowered by its articles of incorporation or that it ever was authorized or empowered by its articles of incorporation to engage in the business of operating of all kinds of fishing appliances or of any kind of fishing appliances in the Columbia River and the waters

thereof or in the Columbia River or the waters thereof.

2.

This defendant admits that on or about the 9th of July, 1906, plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, duly certified to by the Secretary of State of the State of Oregon; and that plaintiff also filed in said office of the Secretary of State of the State of Washington, a writing signed by the vice-president of plaintiff, and attested by the plaintiff corporation seal, wherein and whereby said plaintiff therein constituted and appointed R. A. Hawkins, of Pacific County, Washington, its agent to accept service of process in any action or suit brought by or against plaintiff, within the State of Washington, or in which plaintiff should be a party in said State; and that said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, as Ilwaco, Pacific County, State of Washington; but this defendant denies that plaintiff was or is authorized, at any time whatever or at all, by the laws of the State of Washington or otherwise, to perform every act and transact or to perform any act or transact any kind of business within the *State* [23] *Washington,* in the same manner and in the same extent or in the same manner or to the same extent as corporations incorporated and organized under the laws of said State of Washington, are authorized to do by the laws of said State.

That as to whether a majority of the capital stock

of plaintiff is owned by citizens of the United States, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

3.

Defendant admits paragraph number three of plaintiff's amended complaint.

4.

This defendant denies that prior to the institution of the above-entitled action or at any other time whatever or at all, that the United States of America was and is or that the United States of America was or is the owner in fee or otherwise or at all of that certain tract of land, situated within the County of Pacific, and the State of Washington, the same being an island in the Columbia River, in said Pacific County, Washington, and which is generally named and known as Sand Island; and this defendant denies that the United States of America at any time or at all ever owned Sand Island or any part thereof whatever or at all; and this defendant denies that at the time of this action or at any other time whatever or at all, that the United States of America owned, or that the United States of America is the owner of said Sand Island or any part thereof, or of all or of any of the tide lands or all or any of the water rights or all or any of the privileges or any easements, surrounding or adjacent thereto, and surrounding and adjacent thereto and bordering thereon. [24]

This defendant denies that the United States of America was at the time of the commencement of

e above-entitled action or at any other time what-
er or at all, or that it is the owner of any tide
ıd water rights or privileges, or easement sur-
unding or adjacent to Sand Island defendant al-
ges is an island in the Columbia River situated in
ıcific County, Washington.

This defendant admits that Sand Island is an
and in the Columbia River, in Pacific County,
ashington, and is known as and described as Sand
land.

This defendant denies that said Sand Island was,
proclamation by the President of the United
ates, duly issued and published on the 29th of
ugust, 1863, or at any other time whatever or at all
served from sale, for military purposes or for any
her purpose or for military reservations, or for any
her reservation; and denies that the same has ever
nce the 29th of August, 1863, been held and re-
rved for military and for military purposes, and
r military reservations; and denies that the same
s ever been held and reserved by the United States
any time whatever or at all, for military purposes
d for military reservations or for military pur-
ses or for military reservations or for any other
rposes whatever or at all.

This defendant denies that the Secretary of War,
om the first day of May, 1908, or at any other time
hatever or at all, leased to the plaintiff any tide
nds, water rights, fishing rights, in the Columbia
iver, or in the Columbia River; that defendant de-
es that pursuant to an act of Congress, approved
ly 23, 1892, granting authority to the Secretary

of War in his discretion to lease for a period of not to exceed [25] five years, such property in the United States under his control, as should not be required for public use; and denies that the Secretary of War of the United States on the first day of May, 1908, or at any other time leased to the plaintiff, any tide lands, water rights, fishing rights, or any riparian rights adjacent to Sand Island or to the navigable channel of the said Columbia River. Defendant denies that the Secretary of War of the United States, on the first day of May, 1908, or at any other time, leased to plaintiff, for a valuable consideration, or at all the following portions of Sand Island, to wit: Sites numbered Two and Three, for the term of three years or for any other time, together with the tide lands or any lands, or water rights, or fishing rights, or riparian rights adjacent to said Sand Island; and denies that the Secretary of War at any time whatever or at all leased to plaintiff tide lands or water rights, or fishing rights, or riparian rights adjacent to Sand Island or any part thereof.

And this defendant denies that the Secretary of War, on the first day of May, 1908, or at any other time whatever or at all leased all or any of the frontage or tide lands or any of the riparian rights or any water rights or any privilege whatever or at all of said Sand Island to plaintiff.

Defendant denies that the Secretary of War of the United States leased to the plaintiff on May first, 1908, or at any other time, or at all, any portion of said Sand Island, comprising any frontage or any tide lands, or any riparian rights, or any water

rights, south from high lands, north of the line drawn on the line of low-water mark on the Columbia River, on the south side of said island, beginning at a point 4000 feet east along low-water mark due west of the United States Monument Number **[26]** Four on Sand Island, and thence east along the said shore line to the east boundary line from Monument Number 4 on said Sand Island. Said point being a point on said low-water line that would intersect the north and south line 781 feet distant, east of the United States Monument Number Six, erected on Sand Island, by the United States Government surveyor; and denies that the Secretary of War ever leased to plaintiff at any time whatever or at all, any frontage, tide lands, or tide lands, or riparian rights, or *or* any water rights or any privileges whatever on said Sand Island or that the Secretary of War leased any of the frontage or any of the tide lands or any riparian rights or any water rights, fronting or abutting or adjacent to or in the waters surrounding said Sand Island.

Defendant further denies that the plaintiff ever leased from the United States Government, or from the Secretary of War of the United States, any tide lands or riparian rights or any rights or privileges whatever in the waters of the Columbia River in or surrounding said Sand Island, excepting that defendant admits that Sand Island is an island situated within the said Columbia River, in Pacific County, Washington; and that the Secretary of War of the United States did, on or about the first day of May, 1908, purport to lease to plaintiff Site Number 2 and

Site Number 3; and that said Site Number 2 and the boundaries thereof are described as follows: The west boundary corresponds with the east boundary of Site Number One, and the east boundary is marked by a line due south from the United States Monument Number 5, to low water; and that the boundaries of Site Number One are as follows, to wit: The north boundary is marked by a line drawn due west from the United States Monument Number Four, to the intersection of the low-water line, the east [27] boundary is marked by a line due south from the point 1314.5, due west of the United States Monument Number Four, to the intersection with low-water line; and that Site Number Three is described as follows, to wit: The west boundary corresponds with the east boundary of Site Number Two, and the east boundary is marked by a line due south to low water, from a point 781 feet due east of the United States Monument Number Six.

And this is the pretended lease which plaintiff alleges in its amended complaint; and this defendant denies that the Secretary of War of the United States ever at any time whatever or at all ever leased or pretended to lease to plaintiff any fishing rights in the waters surrounding said Sand Island in the Pacific County, State of Washington.

This defendant further answering says and avers: That neither the Secretary of War of the United States nor the United States has any power and never did have any power or authority whatever to lease to plaintiff or to any other person any riparian or fishing rights, nor the right to fish for salmon

fish in the waters of the Columbia River within Pacific County, Washington; and that the Sand Island which is mentioned and described in plaintiff's amended complaint is not the Sand Island which the President of the United States by proclamation duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations or for military reservations; and this defendant is informed and believes and on his best information and belief alleges and says: That the Sand Island which the President of the United States, by proclamation, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes, and for military reservations, did long prior to the commencement of **[28]** this action, and prior to January first, 1908, became submerged with the water of the Columbia River and it ceased to exist prior to January the first, 1908, and at no time since has existed.

Defendant denies that upon the execution and delivery of said purported lease or of any lease, that plaintiff immediately entered into the possession of said premises, or of any part thereof, or that plaintiff immediately after the first of May, 1908, entered into the possession of said premises or any part thereof, excepting that defendant admits that on the 2d and 3d day of July, 1908, and since said time plaintiff did go upon said Sand Island and did unlawfully trespass upon and unlawfully fish for salmon fish on the locations of this defendant set nets hereinafter described.

Defendant denies that said Sites Number Two

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and Three as aforesaid, and mentioned in plaintiff's amended complaint, are on the south side of said Sand Island, or that either of them is on the south side of said Sand Island; and denies that said Sites Number Two and Three or any or either of them are on the north shore of said main ship channel, but defendant admits that said sites are on the said Sand Island and that said Sand Island is on the north shore of said main ships' channel on the Columbia River.

Defendant admits that said Sand Island and said sites are within the jurisdiction of this Court and are within the Western District and Western Division thereof; and that the water of the Columbia River washes said shore of said Sand Island; and defendant denies that said waters which are in close proximity to said Sand Island, are navigated by the ocean-going or any of the ocean-going vessels or any vessel whatever or at all; and defendant denies that all the vessels that carry or [29] that any vessel that carries the commerce of said States of Washington and Oregon, or either of said States, navigate said waters, excepting that said defendant does admit that the Columbia River is a navigable stream; and that vessels which carry the commerce of the States of Washington and Oregon navigate in the main ships' channel of said Columbia River; and defendant admits that said Sand Island, which is now situated within the Columbia River, and within Pacific County, Washington, is surrounded on the south side of Sand Island by the waters of the Columbia River; defendant denies that said Sites Number Two and

Three or any of them, extend beyond the line of low water in said Columbia River.

Defendant denies that Sand Island or said Sites Number Two and Three or either of them have any riparian rights or that the lessors or any person claiming title thereto have any riparian rights beyond the line of ordinary high tide in the waters of the said river.

That as to whether or not said Sand Island contains any mineral or phosphate, of any kind, this defendant does not have any knowledge or information, sufficient to form a belief and therefore denies that said Sand Island does not contain any mineral or phosphate.

Defendant denies that said premises of said Sand Island or said Sites Number Two and Three or any or either of them are or at any time have been of great value or of any value whatever or at all for the right of fisheries thereon.

This defendant denies that said premises or any or either of them, that is, said Sand Island or said Sites Number Two and Three or either of them were leased to plaintiff by the said United States or the Secretary of War for the sole purpose [30] of being used and employed as a fishery or for the purpose of being used as a fishery or for the sole purpose of operating seines or any seines for catching salmon fish from the shore, and the waters of said river, and landing the same on the shore; and this defendant denies that said Secretary of War of the United States or the United States, or any or either of them, had any right to lease to plaintiff or to any

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other person the waters of said river or any part thereof for the purpose of catching salmon fish or for the purpose of operating seines for the purpose of catching salmon fish in the waters of said river; and denies that the Secretary of War had any right or authority to lease to plaintiff said Sand Island or any part thereof for the purpose of fishing in the waters of said Columbia River; and denies that United States or the Secretary of War thereof leased to plaintiff said Sites Number Two and Three for the purpose of authorizing plaintiff to fish in the waters of said Columbia River.

And this defendant says and avers that the Secretary of War of the United States has no authority and is not and was not authorized to lease to plaintiff the right to fish in the waters of the Columbia River, within Pacific County, Washington; and had no authority to lease to plaintiff or to give to plaintiff the right to fish for salmon fish in the waters of the Columbia River, within Pacific County, Washington.

This defendant denies that under the laws of the United States or otherwise, the said waters are required to be kept free from obstruction; and denies that by virtue of said laws, and said lease, as aforesaid, or either of them, plaintiff is entitled of right to have said waters on said channel of said river free and unobstructed; or that plaintiff is entitled [31] to have said waters free and unobstructed; and denies that plaintiff is entitled of right or at all to the free and unobstructed ingress to and egress

from said premises; and denies that plaintiff has any right of ingress to and egress from said premises; and denies that plaintiff is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish in the waters of said river and landing the same on said shore; and defendant denies that plaintiff is entitled to the exclusive right of catching salmon fish in the waters of said river in front of Sites Number Two and Three or in front of any or either of them; and denies that plaintiff has any right whatever of catching salmon fish in the waters of said Columbia River beyond low tide, and in front of said Sites Number Two and Three.

Defendant denies that plaintiff on the 30th of June, 1908, or at any other time applied to the Fish Commissioner of the State of Washington for a license to operate three seines or any seine upon said Sites Number Two and Three or any or either of them. But this defendant admits that on or about the 30th of June, 1908, plaintiff paid to the Fish Commissioner a license fee exacted by the Fish Commissioner of the State of Washington for licenses number 2391, 2392 and 2393; and that thereupon said Fish Commissioner issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively, 2391, 2392, and 2393; and defendant denies that thereupon plaintiff was entitled to operate three seines or any seine in the waters of the Columbia River within the State of Washington, for a period of one year thereafter, or at any time or at all and defendant denies that plaintiff was entitled to operate said three seines or any seine or any seine

for the purpose of catching [32] salmon fish in the waters of the Columbia River in front of said Sites Number Two and Three, and below low water, in the waters of the Columbia River, in front of said sites; and defendant denies that plaintiff was at any time or is now entitled to operate any seine for the purpose of catching salmon fish below low water in the Columbia River, in the State of Washington, in front of said Sites Number Two and Three or either of them beyond low water.

This defendant denies that on the 2 of July, 1908, or at any other time or at all that the plaintiff was entitled to operate three seines or any seine whatever in front of said Sites Number Two and Three beyond the line of low tide in the waters of the Columbia River and denies that plaintiff was entitled at said time or at any other time whatever or at all, or that plaintiff is now entitled to operate any seine in front of said Sites Number Two and Three or any or either of them in the waters and channel or in the waters or channel of said Columbia River.

Defendant denies that this defendant or that any of the defendants in the above-entitled action wrongfully and unlawfully or wrongfully or unlawfully or in violation of plaintiff's rights or in violation of the laws of the United States, or in violation of any law, placed in the channel of said navigable water of said Columbia River, in front of plaintiff's leased premises or in front of any leased premises of plaintiff or in front of Sites Number Two and Three as aforesaid, certain obstructions; or that defendants or any of them placed any obstruction in or to the naviga-

tion of said waters or in said waters; and denies that defendants or either of them have placed any obstruction whatever in the channel of said [33] navigable waters of the Columbia River or in the waters of said Columbia River; and denies that plaintiff had any right on July 2, 1908, or at any other time, or that plaintiff now has any right to operate its said seines or any seine under its licenses or otherwise or at all in front of said Sites Number Two and Three, below the line of low tide in the waters of the Columbia River within Pacific County, Washington;

Defendant denies that this defendant or that any of the *of the* defendants on July 2, 1908, or at any other time whatever or at all have placed or maintained any obstruction to the navigation of said waters, consisting of large stones or of any other thing, whatever or at all; and denies that this defendant or that any of the defendants at any time whatever or at all have placed any obstruction in the waters of the Columbia River in front of said Sites Number Two and Three or at any other place whatever in said Columbia River. And denies that this defendant or any of the defendants at any time whatever or at all, have placed any obstructions of any character whatever in the waters of said Columbia River at any place in said water whatever; and denies that this defendant or that any of the defendants in any manner whatever or at all have prevented plaintiff from operating a seine on said Sites Number Two and Three; and denies that this defendant or that any or either of the defendants have excluded

the public generally, or the plaintiff or any other person from operating either gill nets, drift nets or seines or any or either of them in the waters of said Columbia River, excepting that defendant admits that on the 2 of July, 1908, he was the owner of and engaged in the operation of two set nets in the waters of the Columbia River in Pacific County, Washington, on the [34] south side of said Sand Island, and that said set nets and each of them were operated by him for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908, and that the number of said licenses owned by him, and under which said set nets were operated are numbers 1431 and 1432; and that the same were duly issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that this defendant paid to the Fish Commissioner of the State of Washington the fee exacted and required by law for said fishing appliances and that said set net number 1431 was situated in the waters of the Columbia River at a point about 200 feet in an easterly direction from what is known as and called "Great Republic Wreck" in front of said Sand Island, in Pacific County, Washington, and number 1432 was about 700 feet easterly from said point; and that each of said set nets were situated in front of Sand Island, beyond the line of ordinary low tide, and also beyond the line of extreme low tide; and between the point of extreme low tide and the adjacent channel of said Columbia River, and that said set nets and each of them were located by a stone anchor,

weighing about 300 pounds, to which was attached a 7/16 inch chain about five feet long, which was clamped to a wire rope about 25 feet long, to which was attached a cedar buoy about 4 feet long and 8 inches square and upon which buoy was securely fastened the license number of each location; and that said nets were operated on the 2d day of July, under the license number 1431 and 1432, and said licenses were issued by the Fish Commissioner on the 15th of April, 1908, in consideration of the payment of the lawful amount required by law for a fish license for each set net, to wit: The sum of $2.50, and each of said licenses bore and [35] bears the number and contains the name of the person to whom said licenses and each of them was granted.

This defendant further avers and also admits that under and pursuant to said license and the laws of the State of Washington, this defendant did, on or about the 16th of June, 1908, cause the location for said set nets and each of them to *to* be made by securely anchoring a buoy on each location as herein described, upon each of which buoys he posted and caused to be posted the number of said license under which *under which* said set net was operated; and said set nets nor neither of them, did not occupy more than one-third of the width of said Columbia River; that at the same place and location where affiant was fishing and operating his said set nets under licenses number 1431 and 1432, his predecessors in interest fished and operated said locations, for the purpose of catching salmon fish with fishing appliances authorized by the laws of the State of Washington, under licenses duly issued by

the Fish Commissioner of the State of Washington, for the year 1902, and during the fishing seasons of each and every year since said year up to and including the year 1907.

That this defendant was fishing and operating his said set nets under licenses numbered 1431 and 1432 as aforesaid, at the time that he was enjoined by order of this Court in this action or proceeding.

That defendant had located and was operating, occupying and fishing said locations with his said set nets, long prior to the time that the plaintiff commenced fishing on said locations, and grounds, with its said drag seines, as alleged in plaintiff's amended complaint, for that plaintiff did not commence fishing on said grounds and locations until on or about the 3d of July, [36] 1908.

Defendant further answering avers and says: That under the laws of the State of Washington, defendant is entitled to and has the sole, prior and exclusive right to the location now occupied by defendant's said set nets, and is entitled to the sole, prior and exclusive right to fish on said locations for salmon fish; and this defendant was fishing for salmon fish on said locations and had selected and located said locations long prior to the time that plaintiff commenced to fish; and that defendant was operating his said set nets for the purpose of catching salmon fish on said locations, at the time that this Court enjoined him; and that this defendant is entitled to the lateral passageway of at least 300 feet and an end passageway of at least 30 feet, between his said set nets, and each of them and all other fishing appliances.

Defendant further says and avers: That defendant was until enjoined by the order of this Court, operating his said set nets, in the usual way and in the only manner in which they can be fished and operated, and in no way and in no manner interfering with the property leased by plaintiff, even if the Court should find that plaintiff had a lease to said property; and said set nets are fished and operated solely and entirely from boats plying upon the waters of the said Columbia River, at a point beyond extreme low tide; and in so fishing said set nets, neither the defendants nor said set nets trespassed upon any lands or shore lines leased by plaintiff.

Defendant further avers: That his said set nets as located and fished by him did not and will not obstruct or interfere with navigation in said river, for the purpose of trade or commerce, or for any other purpose for that said set nets were so constructed [37] and will be so constructed that they will not extend to the adjacent channel of said river, and the water at the present location of said set nets is not to exceed six feet in depth at low tide.

Defendant further avers; that he located his said set net locations and commenced fishing the same long prior to the time and before plaintiff obtained any license from the Fish Commissioner of the State of Washington to fish or operate any drag seines, and prior to the time that plaintiff obtained licenses number 2391, 2392 and 2393, as alleged in its amended complaint, this defendant had located and was fishing and operating for the purpose of catching salmon fish with appliances authorized by the laws of the

State of Washington, and under defendant's said licenses issued to him as aforesaid, by the Fish Commissioner of the State of Washington; and that the place where this defendant was operating and fishing its said set nets was and is in the Columbia River, in Pacific County, Washington, and in that part of said Columbia River, which is described as follows, to wit:

At a point in the Columbia River, in Pacific County, Washington, which is about 200 feet and 700 feet respectively in an easterly direction from the place known and commonly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary low tide, and also extreme low tide, and beyond the line of extreme low water in said river and between said point of extreme low water and the adjacent channel of said river; and the said set nets and each of them was situated in said Columbia River and in front of, but beyond, said Sand Island, and the same were fished and operated by this defendant, at said place, prior to the time that plaintiff obtained [38] any licenses from the Fish Commissioner of the State of Washington, to fish; and prior to the time that plaintiff commenced to fish at said place. And that these set nets of the defendant's are what the plaintiff in its complaint alleges to be obstructions; and this defendant admits that he fished and operated and was fishing and operating said set nets at the place hereinabove described prior to the first of July, 1908. And that he continued to fish and operate the same, for the purpose of catching salmon fish, until he was

enjoined by the order of this Court in this action.

This defendant admits that plaintiff did on the 2 of July, 1908, attempt to remove, take up and destroy, defendant's said set nets; and that plaintiff kept on doing so, and kept on in its attempt at removing and destroying defendant's set nets and defendant's locations, until finally plaintiff came into this court, and in its complaint alleges that the defendant's set nets constituted and were obstructions, to the navigation of said Columbia River, and obtained from this Court an injunction prohibiting this defendant from fishing and operating his said set nets. But this defendant denies that on the 2 of July, 1908, or at any other time whatever or at all, at great labor or expense or time, or otherwise or at all, that plaintiff removed any obstructions from the Columbia River in front of said Sites 2 and 3 and defendant denies that there were any obstructions in front of said sites and in said river until the plaintiff obstructed same and came there and unlawfully attempted to secure the exclusive right to fish in said Columbia River, and thus obstructed the navigation of said river.

Defendant denies that on the 4 of July, 1908, or at any other time, that defendant wrongfully and unlawfully and in [39] violation of the laws of the United States, placed any obstructions in front of said premises; and defendant denies that he ever placed any obstruction at any time, whatever, or at all of any character, in said Columbia River, or in front of said premises. But defendant admits and he also avers as follows:

That he fished and operated his said set nets for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, and numbered 1431 and 1432, and which said licenses were issued to defendant on April 15, 1908; and being the same licenses hereinabove described by defendant. And that number 1431 was situated at a point about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, in the Columbia River, in Pacific County, Washington. And that number 1432 was situated about 700 feet easterly from said point.

This defendant alleges that each of said set nets were situated in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river; and the same were located by a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about five feet long, which was clamped to the wire rope about 25 feet long to which was attached a cedar buoy about four feet long and eight inches square, and upon which said buoy was securely fastened the license number of each said location.

And this defendant admits and also avers as follows: That he was operating said set nets under said licenses for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, at the place hereinabove stated by defendant; and that he continued to operate and fish [40] said set nets under said licenses for the

purpose of catching salmon fish until he was enjoined from so doing by this Court in this action.

And this defendant alleges that these set nets are what the plaintiff in its complaint pretend and charge to be obstructions. But this defendant denies that the same were placed from the shore of said Sites 2 and 3 for that this defendant alleges that the same were placed, that is, that said set nets were situated in the waters of said Columbia River, in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river, and that the same were not upon said Sites Number Two and Three or any part thereof; and that this defendant alleges that he had and still has a prior right to fish for fish in the waters of said Columbia River, under said licenses; and that the plaintiff does not have any right to fish in the waters of said Columbia River, at the places where said set nets were located without leaving for this defendant's said set nets the end and also the lateral passageway required by the laws of the State of Washington.

This defendant denies that said set nets constituted any obstructions to the waters of said navigable river; and denies that they were so placed as to prevent the free ingress to said Sand Island, or any part thereof; and denies that said set nets were so placed as to prevent free egrees from said Sand Island, or any part thereof; and denies that they were so placed as to interfere with or prevent free access to said Sand Island, or any part thereof.

And this defendant denies that said set nets or

either of them constitute any obstruction whatever to the navigable [41] waters of said Columbia River; and denies that said set nets or any or either of them was or are so placed in said Columbia River as to prevent ingress to said Sand Island, or said Sites Number Two and Three or any part thereof; and denies that said set nets were or are so placed in said Columbia River, as to prevent egress from said Sand Island, or said Site Number Two and Three or any part thereof.

This defendant denies that he had or placed any obstruction in said Columbia River at any place whatever in said river, and denies that he ever at any time or place whatever placed or caused to be placed any obstructions, or obstruction whatever, in said Columbia River or in front of Sites Two or Three or in front of Sand Island or any part thereof.

This defendant denies that this defendant or the defendants or either of them threaten to and will unless restrained by this Court, continue to place any obstructions in said waters in front of said premises; and denies that this defendant or any of said defendants will, unless restrained by this Court, place any obstruction whatever in said waters; and denies that this defendant or any of said defendants threaten to or that any of them will use or employ or that any of them will use and employ any obstruction in said waters of said river, excepting that this defendant admits that unless restrained by the order of this Court, that he will continue to fish for salmon fish, during the fishing seasons of the year 1908 and future years, and operate said two set nets, in the waters of

said Columbia River in front of said Sand Island at the place in said waters where the same were at the time of the commencement of this action, as herein in this answer alleged.

But this defendant denies that said set nets or any or either of them, or any part thereof is an obstruction to navigation; or that the same will be an obstruction to navigation in the waters of said Columbia River. [42]

This defendant denies that his said two fishing nets are of no practical use; and denies that they are of no use, but on the contrary avers and says: That the same are of much value and of much profit to this defendant, for the purpose of catching salmon fish, for that salmon fish are of much value and if defendant is permitted to operate the same, he will catch many valuable salmon fish therein.

This defendant denies that said fishing nets are placed or used in the waters of said Columbia River for the purpose of annoying plaintiff or that the same are placed in the waters of the Columbia River for the purpose of preventing plaintiff from operating its seines or for the purpose of interfering with or obstructing free ingress to and the free egress from said Sand Island. But on the contrary, this defendant alleges, says and avers: That this defendant has a prior right to fish for salmon fish his said two set nets in the waters of the Columbia River, in Pacific County, Washington, at the place where the same were at the time of the commencement of this action, and that plaintiff has no right to operate its seines upon or over the locations of defendants said two set

nets, or any or either of them; and this defendant denies that his set nets were not placed in said waters in good faith; and denies that any or either of them is an obstruction to the navigation of said river.

Defendant denies that he has obstructed or that he intends to obstruct the navigation of said Columbia River, in any manner whatever or at all; and denies that he ever placed any obstruction in the waters of said Columbia River; and denies that he intends to place any obstruction whatever in the waters of the Columbia River; defendants admits that he will, unless restrained by the order of this Court, continue to fish and operate [43] for the purpose of catching salmon fish, his two said set nets, under said licenses as aforesaid, during the fishing seasons of the year 1908 and future years. But this defendant denies that said set nets or any or either of them or any part of any or either of them is an obstruction or constitutes an obstruction, or interfered with the ingress to and the egress from said Sand Island or any part thereof.

That as to whether or not the plaintiff has expended, for the purchase of seines or appliances necessary to conduct seining operations on said premises and shores, $15,000.00, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

That as to whether or not plaintiff has employed and now has in its employ and had in its employ at the time of the commencement of this action thirty-four men, this defendant does not have any knowledge or information on which to base a belief, and

therefore denies the same, excepting that defendant admits that plaintiff has employed a large number of men.

But this defendant denies that plaintiff has any right to conduct any seining operations in front of said Sites Two and Three in the waters of the Columbia River, beyond the line of low tide or low water in said river.

This defendant denies that it is necessary for plaintiff to use, keep or care for twenty-four horses or any number of horses in operating said seining ground; and denies that plaintiff has any right to fish for salmon fish with seines in the waters of said Columbia River beyond the line of low water in said Columbia River, in front of said Sand Island, or in front of said Sites Number Two and Three.

This defendant denies that plaintiff is required to [44] pay a rental for said premises in the sum of $5,175.00 per annum or any other sum whatever or at all, excepting that this defendant admits that the Secretary of War of the United States, did purport to lease to plaintiff, for an annual rental of $5,175.00, those certain sites mentioned hereinabove in this answer as Sites Number Two and Three, but this defendant denies that said Site Number Two extends beyond the line of ordinary low water, even if the Secretary of War had the right to lease the same to plaintiff; and this defendant denies that said Site Number Three extends beyond the line of low water, in said Columbia River, even if the Secretary of War of the United States had the right or authority to lease said site to plaintiff; but this defendant denies

that the Secretary of War had any right or authority to lease said sites or any part thereof to the plaintiff.

Defendant admits that the salmon fish in the Columbia River are of great value and ascend the river only at certain intervals during each year, and were at the commencement of this action, and are now in the waters of the said Columbia River, in great numbers.

This defendant denies that defendants or any or either of them ever maintained or ever intend to maintain any obstruction in the waters of the Columbia River, excepting that defendant admits that this defendant intends, unless restrained by the order of this Court, to fish for salmon fish his said two set nets hereinabove in this answer mentioned and alleged.

Defendant denies that unless restrained and enjoined by process of this Court that the alleged damage mentioned in plaintiff's complaint will be committed or that any act of defendant will be a damage to the complainant, or that any action of defendant will produce irreparable damage to the complainant. [45]

Defendant denies that any action of defendant prevents plaintiff from the use of said locations numbered two or three or any or either of them or any part thereof; and defendant denies that any action of defendant will prevent the plaintiff from using its seines on said Sites Two or Three or any or either of them; and defendant denies that any action of defendant will damage the complainant to the amount of many thousands of dollars, or to any amount what-

ever, or at all; and denies that complainant will be damaged by the defendant's acts or act in any manner whatever or at all.

Defendant admits that it is impossible to estimate the number of fish that will be caught in the fish net or other appliance, but this defendant denies that complainant has any right whatever to fish for salmon fish with seines, on location of defendant's said set nets or any or either of them.

Defendant denies that if this defendant is permitted to fish his said two set nets that plaintiff will not be able to use said Sites Number Two or Three or to use its seines on said Site Number Two and Three; but this defendant denies that plaintiff has any right whatever to use his said seines or any or either of them in the waters of the Columbia River, for the purpose of catching salmon fish in said waters, or for any other purpose beyond the line of low water in front of Sand Island, and said Sites Two and Three herein mentioned; and defendant denies that plaintiff has any right to use any seines whatever in the waters of the Columbia River, for the purpose of catching salmon fish in front of Site *Number or* Three, or any or either of them, beyond the line of low water; and denies that plaintiff has any right to use its seines for the purpose of catching salmon fish on the location of this defendant's said two set nets, or any or [46] either of them.

This defendant denies that he has trespassed upon any property or any rights or franchises of plaintiff; and denies that he has ever obstructed at any time whatever or at all, or that he will daily or other-

wise, or at all, or at any time, whatever or at all, place any obstruction in the waters of the Columbia River at any place whatever in said river. But this defendant admits that unless restrained from so doing by the order of this Court, that he will daily continue to exercise the exclusive right of fishery in front of Site Number Two and Three in front of said Sand Island, with his said set nets, below the line of low water, in the waters of the Columbia River, for the purpose of catching salmon fish; and this defendant in this connection says and avers: That this defendant has the exclusive right of fishery in front of said premises with his said two set nets at the location of said two set nets; and that he will continue to fish his said two set nets at the locations and at the place where the same were located at the time of the commencement of this action, unless restrained by the order of this Court, for this defendant alleges that the plaintiff has trespassed upon the right of fishery of this defendant.

This defendant denies that he has ever harrassed or annoyed, or that he will continue to harrass or annoy plaintiff, or that he will prevent plaintiff from ingress to or egress from said premises, excepting that this defendant admits that he will unless restrained by the order of this Court, continue to fish for salmon fish in the waters of the Columbia River within Pacific County, Washington, and below the line of low tide, in front of said Site Two and Three of his said two set nets, under license duly issued by the Fish Commissioner of the State of Washington, [47] and at the places where said two set nets were

located at the time of the commencement of this action, as hereinabove in this answer stated, unless restrained by the order of this Court.

This defendant denies that any emergency exists; and denies that plaintiff is entitled to a preliminary injunction, or any injunction at all, enjoining defendants, or either of them, from maintaining any obstruction; and denies that defendants, or any or either of them had or maintained any obstruction whatever in front of said premises or in waters adjacent thereto or in the waters of the Columbia River; and this defendant denies that he ever maintained any obstruction whatever in the waters of the Columbia River, in Pacific County, Washington, or any other place; and this defendant denies that he ever prevented plaintiff's free ingress to and egress from said Sand Island; and denies that he ever prevented or interfered with the operating of plaintiff's said seines on said Site Two and Three, or any or either of them, or any part thereof; and denies that he ever interfered with or that he intends to interfere with plaintiff from using said seines or any or either of them upon said Site Number Two or Three in said Sand Island.

But this defendant admits that he intends to operate his said two set nets for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, in front of Sites Number Two and Three and at the locations at which said set nets were at the time of the commencement of this action, during the fishing season of this year, and future years, unless restrained by the order of

this Court, but said defendant avers and says: That his said set nets were not upon said Site Number Two and Three, or any part thereof, and that neither of said set nets nor any part thereof were [48] upon any part of said Sand Island, for that said set nets were in the waters of the Columbia River, below low tide and below low water, and did not extend out to the channel or to the main ships channel of said Columbia River, in Pacific County, Washington; and this defendant denies that said set nets are or any or either of them or any part thereof was an obstruction to or interfered with the navigation of said Columbia River, or waters thereof; and denies that the same interfered with or prevented ingress to or egress from said Sand Island, or any part thereof.

Defendant avers and says: That his two set nets hereinabove described and mentioned, are the alleged obstructions of which plaintiff in its complaint complains; and this defendant denies that the same were or are, or that the same will be, any obstruction to the navigation *to* the waters of the Columbia River, or to said waters, or that the same or any or either of them, or any part thereof, were or will be or constitute any obstruction.

Defendant denies that said two set nets were placed in the waters of the Columbia River for the purpose of harrassing or annoying plaintiff; and denies that the same were placed in the waters of the said Columbia River for the purpose of preventing plaintiff from ingress to or egress from said premises; and denies that the same were placed in the waters of the Columbia River for the purpose of preventing plain-

tiff from ingress to or egress from said premises.

That defendant admits that he did not get permission from the Secretary of War of the United States to place his said two set nets in the waters of the Columbia River, for the purpose of fishing for salmon fish in said water; but this defendant [49] denies that said Secretary of War has now or ever had any authority over said two set nets; and denies that the Secretary of War of the United States or that any officer of the Government of the United States has any right or authority to regulate fishing or fishing rights in the waters of the said Columbia River; and denies that it is necessary to receive authority from the Secretary of War or from any officer of the Government of the United States, in order for defendant to fish his said two set nets or fish nets at the location where the same were located at the time of the commencement of this action; and denies that the Secretary of War or any other officer of the United States has any authority whatever to regulate or interfere with fishing for salmon fish in the waters of the Columbia River.

And this defendant denies that plaintiff has any right to raise or litigate any such question in this proceeding.

Defendant, further answering unto said amended bill or complaint of plaintiff, denies all and all manner of unlawful combination and confederacy wherewith he is by the said amended bill charged; without this there is no other matter, cause or thing in said complainant's said amended bill of complaint contained material or necessary for this defendant to make answer to,

and not herein and hereby well and sufficiently answered confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity. [50]

Separate Answer and Defense.

And this defendant, H. S. McGowan, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said amended bill contained, for answer thereto or to as much thereof as this defendant is advised to make answer, says:

And for a further answer and defense unto the cause of action alleged in plaintiff's amended bill of complaint, says, avers, and alleges as follows:

1.

That H. S. McGowan, this defendant, is now and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one-years, and a citizen and resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington,

and in the Columbia River, in said county and State.

2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all [51] of the times hereinafter alleged, a citizen of the State of Oregon.

3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant applied to the Fish Commissioner of the State of Washington for a license to operate and fish for salmon fish, two set nets in the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant paid the Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of $2.50 for license number 1431, and $2.50 for license number 1432. Thereupon said Fish Commmissioner, on the 15th of April, 1908, issued and delivered to this defend-

ant, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, H. S. McGowan, did, on or about the 16th of June, 1908, cause the location for said [52] set nets to be made by securely anchoring a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license under which the said respective set nets *was* operated, to wit: Numbers 1431 and 1432.

5.

That the point and place in the waters of the Columbia River, in Pacific County, Washington, where this defendant did, on the 16th of June, 1908, under license No. 1432 locate his said set nets, was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in *a* easterly direction from the place known and com-

monly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary and also extreme low tide, and beyond the line of extreme low water, in said Columbia River, and between said point of extreme low water and the adjacent channel of said Columbia River and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant for the purpose of catching salmon fish under license number 1432, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action nor at any other time, occupy more than one-third of the width of said Columbia River, [53] and did not extend out to the *man* ships' channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, where this defendant did, on or about the 16 of June, 1908, locate his said set net, under license number 1431, is described *and* follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an *easterly from* what is known and called "Great Republic Wreck" in front of Sand Island, and that said set

net is located in front of said Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

6.

That said license duly authorized and empowered, and authorizes and empowers this defendant to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant ever since on or about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching *of catching* salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff, as hereinafter alleged, and until enjoined by the order of the Court [54] in this proceeding.

7.

That each of said set nets was constructed by means of rope, twine, cord, and lead, and the meshes of each of said set nets were more than three inches stretch measure, and was securely fastened so that it re-

mained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding. [55]

8.

That ever since the 16th of June, 1908, this defendant maintained his said locations of his said set nets, and maintained and operated and fished for the purpose of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner and would now be caught in said set nets and each of them in the following manner, were this defendant permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught in said set nets, and each of them, by entangling themselves in said set nets, and become fast therein, and after they are caught then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

9.

That said defendant was and is entitled to a lateral passageway of at least 300 feet, and an end passageway of 30 feet, between each of his said set nets and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person

to construct or own or operate any appliance for t
purpose of catching fish and salmon fish, in sa
waters, without leaving for this defendant's said
nets, and each of them, an end passageway of at lea
30 feet and a lateral passageway of at least 300 fe
That between each of said defendant's said set [5
nets, there was on the 16th of June, 1908, at the ti
of the location of the same, an end passageway of
least 30 feet, and a lateral passageway of at least 3
feet, between said set nets and said distance remain
between said set nets, until said plaintiff did, as he
inafter alleged, go upon said set nets and upon t
locations of this defendant's said set nets.

10.

That this defendant prior to the commencement
this action, expended large sums of money in acqu
ing the rights of fishing and operating said set ne
and each of them, and that said fishing rights, a
set nets and each of them, was of much value a
profit to this defendant, by reason of the salmon f
caught and to be caught in this defendant's said
nets during the fishing seasons of the year 1908 a
future years. That salmon fish on and in the Colu
bia River, are of great value and ascend the river
large numbers and schools, at certain periods duri
each year, and on the 16th of June, 1908, and at
times thereafter, they were in said river in la
quantities, and were ascending said river, and
ascend said river in large quantities this and e
future year. That salmon fish are of great m
chantable value, and defendant was, on June 16
1908 and at all times until enjoined by this Court,

gaged in the business of operating his said set nets and each of them for the purpose of catching salmon fish therein, for sale in the market, and defendant has derived and expects to derive large profits from his said set nets; and that said set nets and each of them is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all of the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said [57] Columbia River, at the place where this defendant's set nets and each of them was located and operated at the time that the operation of said set nets was enjoined by the order of this Court in this proceeding.

11.

That at the same place and location where this defendant's set nets and each of them was located, fished and operated from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's predecessors in interest, for that defendant's predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years

1902 and until 1907, inclusive, and this defendant, in the manner required by law, acquired said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, this defendant had located and was operating, occupying and fishing with his said two set nets for salmon fish, his said locations of his said two set nets, long prior to the time that plaintiff attempted to secure a location thereon and long prior to the time that plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's said locations, *not* commence fishing [58] on said grounds, and locations, until on or about the 2d or 3d of July, 1908.

That under the laws of the State of Washington, this defendant is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, inter-

fering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased, for defendant's said set nets were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water if permitted by this Court and in so fishing said set nets, defendant never did and defendant does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.

13.

That said set nets as located and fished by this defendant did not, and *of* this Court permits them to be fished and operated, will not interfere with navigation in said river, [59] for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used or can be used, for that said set nets were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets, does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

14.

That each of this defendant's said set nets and exclusive right to fish same were and are of the reasonable value of $10,000.00, and said set nets and each of them catch a great many valuable salmon fish, and if

this defendant is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, if permitted to operate his said set nets will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant would catch in said nets cannot be estimated or computed.

15.

That neither of defendant's said set nets or any part thereof were at any time an obstruction to navigation in said Columbia River. And if defendant is permitted to operate said set nets, at the place and location where the same were at the time of the commencement of this action, the same will not constitute *be* an obstruction, in or to the navigable waters of [60] said Columbia River nor to the navigation of said river. That no part of either of defendant's said set nets or the said buoys which mark the locations thereof were at any time any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river; for the water at the place where said set nets were located at the time of the commencement of this action, of said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said

river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

16.

That neither of defendant's said set nets nor any part thereof was upon any part of said Site Number Two or Three or any part thereof, which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States. And the place where said set nets and each of them was located was not and is not upon said Site Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, did not interfere with or prevent plaintiff from ingress to and egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant is permitted to operate said set nets at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island.

17.

That the defendant intends to and will fish and operate, for salmon fish, said set nets at the same place and location [61] where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court in this proceeding upon final hearing. That the said set nets of this defendant were and constitute obstructions and are the things which plaintiff alleges in its complaint were and constitute obstructions and are the things of which the plain-

tiff in its complaint complains.

18.

That while this defendant was operating and fishing for salmon fish, his said set nets and each of them, at the location and place where the same were located in the waters of the Columbia River in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully, and without the consent of this defendant, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's said set nets, and of each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, with drag seines did fish with said drag seines for the purpose of catching salmon fish in said seines on the location of this defendant's said set nets and each of them, and did catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's said set nets, and each of them, [62] and upon and over the said set nets and each of them, and are now catching salmon fish in its said drag seines, which would

otherwise be caught in defendant's said set nets, and each of them, were defendant permitted to operate and fish his said set nets, by this Court; that thereby, complainant and plaintiff is irreparably damaging and injuring this defendant, and that the damages have and will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant would catch in his said set nets if permitted to operate the same by Court, but defendant alleges that up to the present time he has been damaged by reason thereof in the sum of at least $20,000.00.

19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's said set nets and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's said set nets, and each of them and upon and over the end location and passageway of said defendant's said set nets and each of them, and over said defendant's said set nets and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

20.

That said trespass, herein complained of, and which has been and is now being committed by the

plaintiff, its agents, officers, and servants, as aforesaid, will, unless restrained, [63] continue daily and will prevent this defendant from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant would catch in his said set nets during the fishing season of this and future years if the plaintiff did not fish for salmon fish upon and over the location of defendant's said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's said set nets, and each of them.

21.

That on the second and third of July, 1908, and ever since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to fish for salmon

fish at the place where this defendant's said set nets were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant and prevent this defendant from fishing his said set nets and each of them, at the location as aforesaid; and that plaintiff [64] will continue to exercise the exclusive right of fishery on and over defendant's said set nets, and at the place where the same were located at the time of the commencement of this action; unless restrained by this Court and will daily thus continue to harass and annoy this defendant; and will continue to endeavor to prevent and will prevent this defendant from fishing and operating his said set nets and each of them, unless restrained by this Court.

22.

That the plaintiff and complainant threaten to and will, unless restrained by this Court, continue daily to fish and operate, for the purpose of catching salmon fish, its said drag seines, and other fishing appliances, upon the lateral location and also upon the end passsageway of defendant's said set nets and each of them, and on and over said set nets; and threaten to and will, unless restrained by this Court, prevent this defendant from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's set nets were situated at the time of the commencement of this action; and will, unless restrained by the order of this Court, prevent this defendant from ever fishing or

operating, for the purpose of catching salmon fish, said set nets or any or either of them.

23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant.

24.

That an emergency exists and this defendant is entitled [65] to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's said set nets, and from interfering with this defendant's right to fish and operate defendant's said nets.

WHEREFORE, this defendant, having fully answered, confessed, traversed and denied all mattters in the said amended bill of complaint material to be answered, according to his best knowledge and belief, prays this honorable Court to enter its judgment and decree; that plaintiff take nothing by its said action, and that this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained; and that the Court grants unto this defendant such other further and separate relief in the premises as to this Court may seem meet and in accordance with equity.

H. S. McGOWAN,
Defendant.

WELSH, WELSH, & O'PHELAN,
Attorneys and Solicitors for Defendant H. S. McGowan, Residence and Address South Bend, Pacific County, Washington.

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say:

That I am one of the defendants in the above-entitled action and proceeding; that I am answering defendant herein; that I have read the above and foregoing answer, and said affirmative [66] answer and defense, and know the contents thereof, and that each and every allegation made and thing therein contained is true. Excepting as to such matters and things as are alleged are based on my information and belief, and to those matters and things, I verily believe the same and the whole thereof to be true.

H. S. McGOWAN. [Seal]

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

JOHN T. WELSH,
Notary Public for the State of Washington, Residing at South Bend, in Said State. [67]

Cross-bill and Complaint.

For a cross-bill and for affirmative relief, this defendant H. S. McGowan, your orator, shows to the honorable Judges of the Circuit Court of the United States of America, in and for the Western District of Washington, Western Division, the following facts, and your orator avers, says and alleges, as follows:

1.

That H. S. McGowan, this defendant, your orator is now, and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one years, and a citizen and a resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington, and in the Columbia River, in said county and State.

2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of the State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all of the times hereinafter alleged, a citizen of the State of Oregon. [68]

3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant, your orator, applied to the Fish Commissioner of the State of Washington, for licenses to operate and fish for salmon fish, two set nets in

the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant, your orator, paid the said Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of $2.50 for license number 1431, and $2.50 for license number 1432. Thereupon said Fish Commissioner, on the 15th of April, 1908, issued and delivered to this defendant, your orator, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant, your orator, was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, your orator, H. S. McGowan, did on or about the [69] 16th of June, 1908, cause the location for said set nets to be made by securely fastening a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license

under which the said respective set nets *was* operated, to wit: Nos. 1431, 1432.

5.

That the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did on the 16th of June, 1908, locate his said set nets, under license No. 1432 was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in an easterly direction from the place known and commonly called "Great Republic Wreck," in front of Sand Island, in the Columbia River, beyond the line of ordinary and also of extreme low tide, in said Columbia River, and the adjacent channel of said Columbia River, and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant, for the purpose of catching salmon fish under license number 1436, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant, your orator, caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action, nor at any other time, occupy more than one-

third of the width [70] of said Columbia River, and did not extend out to the main ships' channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did, on or about the 16th of June, 1908, locate his said set net, under license number 1431, is described as follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, and that said set net is located in front of Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water, and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached [71] a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

6.

That said license duly authorized and empowered, and authorizes and empowers this defendant, your orator, to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington, and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant, your orator, ever since on or

about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff as hereinafter alleged, and until enjoined by the order of the Court in this proceeding.

7.

That each of said set nets was constructed by means of rope, twine, cord, and lead and the meshes of said set nets was more than three inches stretch measure, and was securely fastened so that it remained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding.

8.

That ever since the 16th of June, 1908, this defendant, your orator, maintained his said locations of his said set nets, and maintained and operated and fished for the purpose [72] of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner, and would now be caught in said set nets and each of them in the following manner, were this defendant, your orator, permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught

in said set nets, and each of them, by entangling themselves in said set nets, and becoming fast therein, and after they are caught, then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

9.

That said defendant, your orator, was and is entitled to a lateral passageway of at least 300 feet and an end passageway of 30 feet, betweeen each of his said set nets, and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person to construct or own or operate any appliance for the purpose of catching fish and salmon fish, in said waters, without leaving for this defendant's, your orators, said set nets, and each of them, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet. That between each of said defendant's, your orator's, said set nets, there was, on the 16th of June, 1908, at the time of the location of the same, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet, between said set nets, and said distance remained between said set nets, until said plaintiff did, as [73] *as* hereinafter alleged, go upon said set nets, and upon the locations of this defendant's, your orator's, said set nets.

10.

That this defendant, your orator, prior to the commencement of this action, expended large sums of money in acquiring the rights of fishing and operat-

ing said set nets, and each of them, and that said fishing rights, and said set nets and each of them, was of much value and profit to this defendant, your orator, by reason of the salmon fish caught and to be caught in this defendant's, your orator's, said set nets, during the fishing seasons of the year, 1908 and future years. That salmon fish on and in the Columbia River, are of great value and ascend the river in large numbers and schools at certain periods during each year, and on the 16th of June, 1908, and at all times thereafter, they were in said river in large quantities and were ascending said river, and will ascend said river in large quantities this and each future year. That salmon fish are of great merchantable value, and defendant, your orator, was on June 16th, 1908, and at all times enjoined by this Court, engaged in the business of operating his said set nets, and each of them, for the purpose of catching salmon fish therein, for sale in the market, and defendant, your orator, has derived and expects to derive large profits from his said set nets; and that said set nets, and each of them, is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said Columbia River, at the place where this defendant's, your orator's, said set nets and each of them was located and operated at the time that the operation of said set [74] nets was enjoined by the order of this Court, in this proceeding.

11.

That at the same place and location where this defendant's your orator's, set nets, and each of them was located, fished and operated, from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's your orator's, predecessors in interest, for that defendant's, your orator's, predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years 1902 and until 1907, both inclusive, and this defendant, your orator, in the manner required by law, purchased said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, your orator, this defendant, your orator had located and was operating, occupying and fishing with his said set nets for salmon fish his said locations of his said set nets, long prior to the time that plaintiff attempted to secure a location thereon and long *prior that* plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's, your orator's, said locations nor com-

menced fishing on said grounds, and locations until on or about the 2d or 3d of July, 1908. [75]

That under the laws of the State of Washington, this defendant, your orator, is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's, your orator's, said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, your orator, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, interfering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased; for defendant's, your orator's, said set nets, were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water, if permitted by the Court, and in so fishing said set nets, defendant, your orator, never did and defendant, your orator, does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.

13.

That said set nets as located and fished by this defendant, your orator, did not and if this Court permits them to be fished and operated, will not interfere with navigation [76] in said river, for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used, or can be used, for that said set nets, were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

14.

That each of this defendant's, your orator's, said set nets and the exclusive rights to fish the same were and are of the reasonable value of $10,000.00, and said set nets, and each of them, catch a great many valuable salmon fish, and if this defendant, your orator, is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, your orator, if permitted to operate his said set nets, will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant, your orator, would

catch in said nets cannot be estimated or computed.

15.

That neither of defendant's, your orator's, said set nets or any part thereof, were at any time an obstruction to navigation in said Columbia River. And if defendant, your orator, is permitted to operate said set nets, at the place and [77] location where the same were at the time of the commencement of this action, the same will not constitute or be an obstruction, in or to the navigation of the Columbia River nor to the navigable waters of said river. That no part of either of defendant's, your orator's, said set nets, or the said buoys, which mark the locations thereof, were at any time *any time* any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river, for the water at the place where said set nets were located at the time of the commencement of this action *of* said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

16.

That neither of defendant's, your orator's, said set nets, nor any part thereof was upon any part of said Site Number Two or Three or any part thereof which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States, and the place where said set nets and each of them was

located was not and is not upon said Sites Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, your orator, did not interfere with or prevent plaintiff from ingress to or egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant, your orator, is permitted to operate said set nets, at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island. [78]

17.

That the defendant, your orator, intends to and will fish and operate for salmon fish, said set nets at the same place and location where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court, in this proceeding, upon final hearing. That the said set nets of this defendant, your orator, were and are the things which the said plaintiff alleges in its complaint were and constitute obstructions to the navigation of said river, and are the things of which the plaintiff in its complaint complains.

18.

That while this defendant, your orator, was operating and fishing for salmon fish, his said set nets and each of them at the location and place where the same were located in the waters of the Columbia River, in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other

dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully and without the consent of this defendant, your orator, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's, your orator's, said set nets, and each of them, and upon and over the location of said set nets, and each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, your orator, with drag seines, did fish with said drag seines for the purpose of catching salmon in said seines on the location of this defendant's, your orator's, said set nets and each of them, and did [79] catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's, your orator's, said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, your orator, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's, your orator's, said set nets, and each of them, and upon and over the said set nets and each of them, and are now catching salmon fish in its drag seines, which would otherwise be caught in defendant's, your orator's, said set nets, and each of them, and are now catching salmon fish in its said drag seines which would otherwise be caught in defendant's, your or-

ator's, said set nets, and each of them, were defendant, your orator, permitted to operate and fish his said set nets by this Court; that thereby complainant and plaintiff is irreparably damaging and injuring this defendant, your orator, and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant, your orator, would catch in his said set nets, if permitted to operate the same.

19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's, your orator's, said set nets, and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's, your orator's, [80] said set nets, and each of them, and upon and over the lateral location and passageway of said defendant's, your orator's, said set nets, and each of them, and over the end location and passageway of said defendant's, your orator's, said set nets, and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

20.

That said trespass, herein complained of, and which has been and is now being committed by the plaintiff, its agents, officers, and servants, as afore-

said, will, unless restrained, continue daily and will prevent this defendant, your orator, from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant, your orator, will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant, your orator, will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant, your orator, *would in* his said set nets during the fishing season of this and future years, if the plaintiff did not fish for salmon fish upon and over the location of defendant's, your orator's, said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's, your orator's, said set nets, and each of them.

21.

That on the second and third of July, 1908, and ever [81] since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant, your orator, from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to

fish for salmon fish at the place where this defendant's, your orator's, said set nets, were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant, your orator, and prevent this defendant, your orator, from fishing his said set nets and each of them, at the locations as aforesaid; and that plaintiff will continue to exercise the exclusive right of fishery on and over defendant's, your orator's, said set nets, and at the place where the same were located at the time of the commencement of this action, unless restrained by this Court; and will daily thus continue to harass and annoy this defendant, your orator, from fishing and operating his said set nets, and each of them, unless restrained by this Court.

21½.

That because your orator has been enjoined in this suit and prevented from fishing for the purpose of catching salmon fish, each of his said set nets, in the waters of the Columbia River, in Pacific County, Washington, and at the locations hereinabove alleged, he has been damaged in the sum of many thousand dollars, but it is impossible to allege or state specifically the exact amount of money in which your orator alleges and avers that he has been damaged in the sum of at least $20,000.00 up to the present time, as near as your orator can now state and aver.

22.

That the plaintiff and complainant threatened to and will [82] unless restrained by this Court, continue daily to fish and operate for the purpose of catching salmon fish, its said drag seines and other

fishing appliances, upon the lateral location and also upon the end passageway of defendant's, your orator's, said set nets, and each of them, and on and over said set nets; and threatened to and will unless restrained by this Court, prevent this defendant, your orator, from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's, your orator's, said set nets were situated at the time of the commencement of this action, and will, unless restrained by the order of this Court, prevent this defendant, your orator, from ever fishing or operating, for the purpose of catching salmon fish, said set nets, or any or either of them.

23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant, your orator.

24.

That an emergency exists and this defendant, your orator, is entitled to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's, your orator's, said set nets, and from interfering with this defendant's, your orator's, right to fish and operate defendant's, your orator's, said set nets.

WHEREFORE, your orator to the end, that he may obtain relief to which he is justly entitled in the

premises, prays [83] the Court to grant him, a judgment and decree as follows:

1.

That the Court grant to him a writ of subpoena, directed to the said Columbia River Packers' Association, complainant in the above-entitled action, requiring and commanding it to appear herein and answer under oath, to the several allegations in this cross-bill contained.

2.

That complainant be required to set forth any and every adverse interest, claim or demand, in or to the said premises, and upon which your orator's set nets were located at the time of the commencement of the above-entitled action, to the end, that said adverse interest, claim or demand may be justly adjudicated and declared null and void as against this cross-complainant, and your orator; and that the exclusive right to fish and operate your orator's said set nets, on the locations where the same were at the time of the commencement of this action, be established in your orator and confirmed in your orator, as against any and all claims of the said Columbia River Packers' Association.

3.

That your Honors grant unto your orator, this cross-complainant, further judgment and decree as follows:

That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein, enjoining and restraining the Columbia River Packers' Association, the complainant in the

above-entitled action, and its servants, agents, employees and all persons acting by, through, or under it, from fishing, on the locations of your orator's said set nets, in the Columbia River, in Pacific County, Washington, and from [84] fishing for salmon fish on the locations of said set nets or any or either of them; and from interfering with this defendant in the maintenance and operation of his said set nets; and that upon the final hearing herein that your Honors grant unto your orators a writ of injunction, forever and perpetually enjoining and restraining the Columbia River Packers' Association, its agents, servants, officers and employees, and all persons acting under, or through it, from in any manner interfering with your orator in the operation of your orator's said set nets, and from maintaining operating or fishing for the purpose of catching salmon fish, in any fishing appliances whatever, upon or over the locations of your orator's said set nets in the waters of the Columbia River, and from interfering with the operation of your orator's said set nets, or any or either of them.

3½.

That your orator have a judgment against plaintiff and complainant in the sum of $20,000.00.

4.

That your orator have such other, and further judgment and decree and relief in the premises as to the honorable Court may seem equitable and just, and for his costs and disbursements herein; and that your orator may have such other or further relief in the

premises as the nature of the circumstances in the case may require.

WELSH, WELSH & O'PHELAN,
Solicitor, Counselor and Attorney for Cross-complainant, and Your Orator, H. S. McGowan, Residence and Address, South Bend, Washington.

H. S. McGOWAN,
Your Orator. [85]

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say:

That I am the cross-complainant and your orator named in the above and foregoing cross-bill and complaint; that I have read the same and know the contents thereof and the same and the whole thereof is true, as I verily believe, and I have signed the said verification.

H. S. McGOWAN.

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

[Seal] JOHN T. WELSH,
Notary Public for the State of Washington Residing at South Bend in Said State.

Filed U. S. Circuit Court, Western District of Washington. Aug. 28, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [86]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Demurrer of Plaintiff to Cross-complaint of Defendant McGowan.

The demurrer of Columbia River Packers' Association, plaintiff, to the alleged cross-bill of defendant H. S. McGowan, one of the above-named defendants.

This plaintiff, by protestation, not confessing all or any of the matters and things in the said defendant's alleged cross-bill contained to be true in such manner and form as the same therein set forth and alleged, doth demur to said alleged cross-bill and for cause of demurrer showeth to the Court,

First: That this honorable Court hath no jurisdiction to entertain said alleged and pretended cross-bill, as a cross-bill, for that it is not the beginning of an independent suit, neither is it pleaded as a defense to plaintiff's cause of suit;

Second: That said alleged cross-bill doth not con-

tain any matter of equity whereon this Court can ground any decree or give to the said defendant any relief against this plaintiff;

Third: That as to all matters and things set forth in said alleged and pretended cross-bill, the said defendant hath right to plead and has pleaded the same in his separate answer to the original bill filed herein.

WHEREFORE and for divers and other good causes of [87] demurrer appearing in the said alleged cross-bill, plaintiff doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer thereto and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

G. C. FULTON,
Solicitor for Plaintiff.

State of Oregon,
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say that on September 2, 1908, I caused to be deposited in the United States postoffice, at Astoria, inclosed in an envelope duly stamped addressed to Messrs. Welsh, Welsh and O'Phelan, Attorneys at Law, South Bend, Washington, being the attorneys for defendants, a true, full and correct copy of the within and foregoing demurrer.

G. C. FULTON.

Subscribed and sworn to before this 2d day of September, 1908.

[Notarial Seal] W. M. VAN DUSEN,
Notary Public for Oregon.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Sep. 9, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [88]

In the United States Circuit Court for the Western District of Washington, Western Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSY and L. N. STENSLAND,

Defendants.

Order [or Decree Overruling Plaintiff's Demurrer to Cross-complaint].

Now on this date the above-entitled cause was brought on for hearing before the Court upon the separate demurrers of the plaintiff to the separate cross-bills and complaints of each of the defendants H. S. McGowan, Erick Lindstrom, and J. P. Coyle; the plaintiff appearing by its attorney G. C. Fulton, Esq., and the defendants by their attorneys Messrs. Welsh & O'Phelan, and the Court, after listening to the arguments of their respective counsel, and being fully advised in the premises, overrules each of said demurrers.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED by the Court that the

demurrers of the plaintiff to the cross-bills and complaint of the defendant J. P. Coyle, and the demurrer of the plaintiff to the cross-bill and complaint of defendant H. S. McGowan, and the demurrer of the plaintiff to the cross-bill and complaint of Erik Lindstrom, be, and they are hereby and each of them is, overruled.

IT IS FURTHER ORDERED that the plaintiff be, and it is hereby allowed twenty (20) days in which to answer to each of said cross-bills.

Dated this 21st day of October, A. D. 1908. [89]

C. H. HANFORD,
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 21, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [90]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Answer of Plaintiff to Cross-complaint of Defendant McGowan.

Comes now the above-named plaintiff and now and

at all times hereinafter saving to itself all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the defendant, H. S. McGowan's cross-bill and complaint, filed herein in the above-entitled action, and for answer thereto admits, alleges, and denies as follows, that is to say,

I.

This plaintiff answering unto paragraph No. 3 of said cross-bill and complaint admits that the said H. S. McGowan applied to the Fish Commissioner of the State of Washington for licenses to operate three set nets in the waters of the Columbia River, but denies that the said H. S. McGowan, on the 15th of April, 1908, or at any other time whatever, or at all, or pursuant to the laws, or any law, of the State of Washington applied to such commissioner for licenses to operate or fish for salmon fish, or any fish, three set nets, or any set nets, in Pacific County, Washington, at the places, or any place, where said alleged or any set nets, or any set net, was located at the time of the commencement of this action, or elsewhere; and denies that said application covers any [91] particular locality or place or any county. This plaintiff does not deny that said McGowan obtained three licenses to operate two separate set nets and numbered respectively 1431, 1432; but denies that said licenses authorized him to operate the same or either in any particular river or any particular water or confined the same to the Columbia River, but the same were and each was a roving license.

II.

This plaintiff answering unto paragraph No. 4 of said cross-bill and complaint denies that, under and pursuant to said licenses, or any license whatever, or under the laws or any law of the State of Washington, the defendant H. S. McGowan did on or about the 16th of June, 1908, or at any other time whatever, cause the or any location for said alleged set nets, or set net, to be made by securely, or at all, fastening a buoy on the location, or on any location, or for each or any set net, or upon which he posted or caused to be posted the number of the license, or any license, or any number under which the said alleged respective set nets, or either, was operated, or numbered 1431, or 1432, or either thereof or any number, excepting plaintiff admits that said defendant Coyle did place certain obstructions in the waters of the Columbia River immediately in front of said Sites No. 2 and 3 mentioned in plaintiff's complaint, which he called set net locations and falsely represented them to be set net locations, and they are the same obstructions complained of in plaintiff's complaint.

III.

This plaintiff answering unto paragraph No. 5, alleges that it has no knowledge or information sufficient to form a belief as to whether or not the point or place in the waters of the [92] Columbia River in Pacific County where said defendant alleges that on the 16th of June, 1908, he located the said alleged set nets, or either, or under license No. 1432, was located accordingly as in said paragraph described, for that plaintiff is not familiar with the description

of the location as described but alleges that the alleged and pretended set net, set forth and described therein, is one of the obstructions complained of in plaintiff's complaint. This plaintiff also alleges that it has no knowledge or information sufficient to form a belief as to whether or not the description of the exact location of the alleged and pretended set nets under said alleged licenses No. 1431 and 1432 is correct, but avers that the same were located in front of said premises described in plaintiff's complaint and was and is one of the obstructions complained of in plaintiff's complaint. Plaintiff also admits that the point where each of said alleged and pretended set nets are located are below the line of ordinary low water, but denies the same, or either, are beyond the line of extreme low water of the Columbia River; and denies that the same were between the line of extreme low water and the adjacent channel of said Columbia River; and alleges that the same are within the channel of said river, that is the said river is navigable at the point where said alleged and pretended set nets, described in said cross-bill and complaint of H. S. McGowan, are located and were located at the beginning of this action; and denies that the same are beyond Sand Island, but admits the same are in front of said Sand Island; and denies that either of said alleged set nets, or the location thereof, was being fished or operated by defendant H. S. McGowan for the purpose of catching salmon fish or under any license number, or otherwise, than in violation of law and the rights of plaintiff herein; and denies that the Fish Commissioner of the State

of Washington had any right or authority to grant such defendant any right to construct, operate, or maintain either of said alleged and [93] pretended set nets in front of said Sites No. 2 and 3 aforesaid. This plaintiff further denies that on the 16th of June, 1908, or at any other time or at all, said defendant caused the location of said alleged and pretended set net No. 1431 or 1432 or either to be made by securely anchoring a buoy in the waters of said river, or otherwise, or on the location set forth in said answer, or upon which he at the said time, or at all, placed or posted or caused to be posted a number of said alleged licenses, but admits that said defendant did before the first day of July, 1908, prior to the institution of this action, cause certain buoys to be securely anchored in the waters of said river in front of Sites No. 2 and 3, described in plaintiff's complaint, upon which certain numbers were posted, and plaintiff is informed said buoys were numbered 1431 and 1432, and that the placing of said buoys which said defendant wrongfully calls set nets are some of the obstructions complained of in plaintiff's complaint; and this plaintiff further admits that there was attached to each of said alleged and pretended set nets a large stone weighing at least 300 pounds to which was attached rope, wire, and chain; and plaintiff alleges that the same were so firmly anchored and secured that it was impossible to operate any other fishing device in said waters.

IV.

This plaintiff answering unto paragraph No. 6 of said cross-bill and complaint says that it is not true

and denies that said licenses, or either of them or any of them, duly authorized or empowered, or authorizes or empowers defendant to fish or operate said alleged set nets, or either thereof, on said alleged respective locations, or upon any part or portion of the waters or bed of the Columbia River in front of said Sites No. 2 and 3 or between the line of low-water mark and the navigable channel [94] of said river at any time whatever, or at all, or during the entire or any portion of the fishing season of 1908, or any other time whatever, or for the purpose of catching salmon or other fish, or for any purpose whatsoever; and denies that said defendant since or about the 16th of June, 1908, or at any other time whatever, or at all, has fished or operated each or either of said alleged set nets or any set net in front of said Sites 2 and 3 aforesaid for the purpose of catching salmon fish at either of said locations aforesaid until interfered with by plaintiff, or until enjoined by the order of this Court in this proceeding, but on the contrary this plaintiff avers that said alleged set nets were placed by defendant in front of said Sites 2 and 3, described in plaintiff's complaint for the sole purpose of harassing and annoying this plaintiff and preventing plaintiff from operating same on said Sand Island on said sites, and for no other purpose whatever.

V.

This plaintiff, answering unto paragraph No. 7 of said cross-bill and complaint of said defendant H. S. McGowan, denies that each or either of said set nets was constructed by means of ropes or twine or cord

or lead, or that the meshes of each or either of said alleged set nets was more than three inches, stretch measure; and denies that either of said alleged set nets as described in said answer was intended as a set net or fished as such, but admits that each was secured firmly so that it remained as located in said Columbia River until removed by this plaintiff and enjoined by this Court; and denies that any fish were ever caught in either of said set nets, or that they were operated so as to catch any fish.

VI.

This plaintiff answering unto paragraph No. 8 of said [95] cross-bill and complaint denies that ever since the 16th of June, 1908, or at any time whatever, or at all, this defendant maintained his said locations, or either thereof, or of his said alleged set nets or either thereof, or maintained or operated or fished either thereof for the purpose of catching salmon fish, or otherwise, or at all, or until interfered with by plaintiff or until enjoined by the order of this Court, but admits that said alleged set nets as described in plaintiff's complaint were kept and maintained in front of said Sites No. 2 and 3 on said Sand Island as alleged in plaintiff's complaint until removed and further maintenance enjoined by this Court. This plaintiff further denies that said alleged set nets, or either thereof, or each or any of them, caught any fish or any fish were caught therein, or in either thereof in any manner whatever, or in the manner alleged in the said alleged cross-bill and complaint; and denies that any fish would now be caught in any of said set nets, or either of them or

each thereof, in any manner whatever should said defendant be permitted to operate same or either thereof; and denies that fish were or could be caught in either of said set nets or in each of them or in any of them by entangling themselves in any of the set nets or either thereof, or become fast therein, for that the buoys and anchors were utterly incapable of catching any fish and fish could not become entangled in the buoys or the wires or chains or the anchors, and the alleged web attached to said alleged set nets was old and worn and rotten and was only attached at one end leaving it swinging with the winds and tides. Plaintiff admits that if any fish could, by any possible chance, be caught in such contrivances they could very readily be taken out by men in small boats afloat on the water, providing it was high tide but could not be so removed at low tide. **[96]**

VII.

This plaintiff, answering unto paragraph No. 9 of said cross-bill and complaint, denies that said defendant was or is entitled to a lateral passageway or any passageway of at least 300 feet or any feet whatever, or any lateral passage or an end passageway of 30 feet or any end passageway, or any passageway or at all, or between each of his said alleged set nets or elsewhere, or otherwise, or at all, or any other fishing appliances or any fishing appliances placed on said river, or to be placed therein; and denies that it is a crime under the laws or any law or statutes or any statute of the State of Washington or punishable under said alleged or any law for any person to construct or own or operate any appliance for the

purpose of catching fish or salmon fish or any fish, in said waters, or elsewhere, without leaving for defendant's said alleged set nets, or either thereof or each of them, or either of them an end passageway or any passageway of at least 30 feet or any distance whatever, or a lateral passage of at least 300 feet, or any distance, for that the said defendant had no right or authority to enter upon or into said premises to construct or operate said alleged set nets, or either thereof.

VIII.

This plaintiff answering unto paragraph No. 10 of said cross-bill and complaint denies that the defendant, prior to the institution of this action, expended large sums or any sum of money in acquiring the rights, or any right, of fishing or operating said alleged set nets, or each of them or either thereof, but admits that the right of fishing at that said point and in front of said Sites 2 and 3 aforesaid was of great value and profit; and denies that the or any rights acquired by the defendant therein were or was of any value whatever to defendant, [97] for that he acquired nothing; and denies that the said defendant was on June 16th, 1908, or at any time, or at all, or at all times or at any time, until enjoined by this Court, engaged in operating his said alleged set nets or either thereof or each of them for any purpose or for the purpose of catching salmon fish therein, or otherwise, or for sale in the market or otherwise, or that defendant has derived or expects to derive large or any profits from said alleged set nets or either thereof; and denies that either of said

alleged set nets is of much or of any value by reason of the salmon fish caught, or to be caught therein.

IX.

This plaintiff, answering unto paragraph No. 11 of said cross-bill and complaint, denies that, at the same place or location where defendant's alleged set nets or each of them or either thereof was located or fished or operated as alleged from the 16th of June, 1908, or at any time or until enjoined by this Court in this proceeding, said alleged locations or either or each of them was fished or operated for the purpose of catching salmon fish during the fishing season of the year 1902, or during the fishing seasons of each and every or each or every or any year or time since said year up to or including the year 1907 by the defendant's alleged, or any predecessor or predecessors in interest; and denies that defendant's alleged predecessors or any predecessors in interest of defendant fished or operated either of said locations by set nets or otherwise for the purpose of catching salmon fish or other fish with fishing appliances, or otherwise, or any appliance authorized by the laws of the State of Washington or any licenses issued by the Fish Commissioner of the State of Washington; and denies that said [98] defendant, in the manner provided by law, or otherwise, purchased said alleged or any interest in said alleged locations or either thereof; and denies that under said or any licenses issued to said defendant by the Fish Commissioner of the State of Washington defendant had located or was operating or occupying or fishing with his alleged two set nets, or either thereof for salmon fish,

or otherwise, his said alleged locations or either of them, or of his said alleged locations of his said alleged set nets, or either thereof a long time prior, or at any time prior to the time that plaintiff attempted to secure or locate thereon, or at any time whatever, or long prior or at any time prior to the time that plaintiff commenced fishing on said alleged locations or either thereof or at any other time whatever or at the time plaintiff commenced fishing operations with its drag seines. This plaintiff admits that it did not begin actual fishing operations on its said premises until about the 2d or 3d of July, 1908; and denies that it was required to secure any additional fishing location, being the owner of said premises; and denies that, under the laws or any law of the State of Washington or otherwise, defendant is or was entitled to the sole, prior, and exclusive or sole, prior or exclusive right or any right to the alleged locations, or either thereof, which were occupied by defendant's said alleged set nets, or either thereof, at the commencement of this action, or was then or is now or ever was entitled to the sole, prior and exclusive, or the sole, prior, or exclusive or any right to fish on said locations or either thereof for salmon fish or for any fish whatever, or with his said alleged or any set nets or any set net during the fishing season of this or future years of any time whatever, or at all. On the contrary plaintiff alleges that it has the exclusive right [99] to drag seines over and across the premises now occupied by the obstructions placed in front of said Sites 2 and 3 by the defendant herein which defendant calls set nets,

and the acts of said defendant in placing said buoys and anchors and the placing of said alleged set nets in front of said Sites 2 and 3 were and are the trespasses and continuing trespasses complained of in plaintiff's complaint.

X.

This plaintiff answering unto paragraph No. 12 of said cross-bill and complaint denies that, at the commencement of this action or at any time or ever since the 16th of June, 1908, or at any time whatever or at all, defendant was fishing or operating said alleged or any set nets or any set net in the usual way or in any way whatever, or in the only manner in which they or either could be fished or operated for the purpose of catching salmon fish, or otherwise or at all, or was in no way or in no manner interfering with the Sites No. 2 or 3, as alleged in plaintiff's complaint, but avers that said obstructions which defendant calls set nets are and were at the institution of this action obstructions to the navigation of said waters and absolutely prevented seining operations on said Sites 2 and 3 and each thereof. Plaintiff admits that if said alleged set nets are operated as set nets for the purpose of catching salmon fish same would be fished and operated entirely from boats on the waters of said river, providing the same were attended to at high water, but at low water the points where said obstructions are located are not susceptible to navigation; and plaintiff admits that it is not necessary to go or trespass upon the high land of said sites aforesaid, but denies that if defendant is permitted to fish or operate set nets attached

[100] to said buoys or obstructions defendant does not intend to and denies that it is not necessary to trespass or to go upon or over said Sites 2 and 3 or any part thereof; and denies that said sites or either thereof do not extend beyond low water in the waters of the Columbia River, but alleges that the same extend to and beyond the line of low-water mark and beyond the point where said obstructions are and were located; and furthermore plaintiff is entitled to the free and unobstructed ingress to and egress from said sites which said obstructions prevent and interfere with as alleged in plaintiff's complaint.

XI.

This plaintiff answering unto paragraph No. 13 of said cross-bill and complaint denies that said alleged set nets or either thereof, as located or fished by defendant, did not, and denies that if this Court permits them or either to be fished or operated, will not interfere with the navigation of said river for the purpose of trade or commerce or for any other purpose or for which the navigation of said river is used or can be used. This plaintiff denies that neither of said set nets extends to the channel of said river, but admits that the water at the place of the location of each thereof does not exceed six feet in depth at low tide, and avers that the depth of the water at said buoys at low tide does not exceed one foot.

XII.

This plaintiff answering unto paragraph No. 14 of said cross-bill and complaint denies that each or either of defendant's said alleged set nets or the obstruction complained of or the alleged exclusive

right to fish the same or otherwise or either is or were or are of the reasonable value of $10,000.00 or any sum or amount whatever; and denies that said alleged set nets or either **[101]** thereof or each of them or any of them catch a great many or any valuable or any salmon fish; and denies that if defendant is permitted to fish or operate them or either, they or either would catch a great many or any valuable or any salmon fish, or amount to many thousand dollars' worth, or of any value whatever; and denies that the exact amount or value of the fish that could be caught in said alleged set nets as operated by defendant cannot be or is impossible to determine. Plaintiff admits that salmon are of great merchantable value; but denies that during the fishing seasons or either thereof of the year 1908 or at any time or future years, or at any time, defendant, if permitted to operate said alleged or either of said alleged set nets, will catch therein many valuable or any salmon fish *or* great or of any value or worth many thousand dollars, or any sum or amount whatever; and denies that the exact amount of salmon fish or the value of salmon fish that the defendant would catch in the said alleged set nets or either thereof cannot be estimated or computed, but avers that the same could not catch any fish whatever and were not constructed for that purpose and neither were operated for such purpose.

XIII.

This plaintiff answering unto paragraph No. 15 of said cross-bill and complaint denies that neither of said defendant's said alleged set nets or any part

thereof was at any time an obstruction to the navigation of said Columbia River, but on the contrary alleges that each was an obstruction to the navigation of said river; and denies that if defendant is permitted to operate said set nets or either thereof at the place or location where same were, at the time of the commencement of this action, the same will not constitute or be an obstruction in or to the navigation of the Columbia River or to the navigable waters of said river; and denies that no part of said buoys or either thereof **[102]** which mark the locations thereof or either thereof were not at any time an obstruction in or to the navigation of said Columbia River, but avers that each thereof was and is an obstruction to such navigation; and denies that neither thereof was in the navigable portions of said river, but admits that the point where each was located the water does not exceed in depth at low tide six feet and avers that at low tide the depth of the water at said point was about one foot but same constituted a portion of the channel of said river; and denies that neither thereof extended out to the channel of said river or to the part of the river used by boats or vessels plying the waters of said river for the purpose of trade or commerce.

XIV.

This plaintiff answering unto paragraph No. 16 of said cross-bill and complaint denies that neither of said set nets or any part thereof was upon any part of said Sites No. 2 and 3, or any part thereof, but avers that each were upon said two sites aforesaid; and denies that the place where said obstructions and

buoys were located were not upon said sites, but alleged that each were upon said sites; and denies that the said alleged set nets or either thereof, or the operating or the fishing of the same or either thereof did not interfere with or prevent plaintiff from ingress to or egress from said Sites No. 2 or 3 of said Sand Island, mentioned in plaintiff's complaint, but avers that each thereof did interfere with and prevent the free ingress to and egress from such sites; and denies that if defendant is permitted to operate said alleged set nets, or either thereof, at the place where same were or either was located at the commencement of this action neither will interfere with or prevent plaintiff's free ingress to or egress from Sand Island, but avers **[103]** that same will interfere and obstruct the free ingress to and egress from said Sites 2 and 3 as set forth and alleged in plaintiff's complaint.

XV.

This plaintiff, answering unto paragraph No. 17 of said cross-bill and complaint, denies that said defendant intends to or will fish or operate for salmon fish, or otherwise, said alleged set nets or either thereof at the same place or any place, or location where same are or either was located on or about the 16th of June, 1908, or at any time if permitted by the Court, or unless restrained by this Court upon final hearing, but avers that said obstructions were not intended as set nets but were intended simply to harass and annoy this plaintiff and prohibit plaintiff from operating seines upon the shore of said Sand Island; and denies that the said alleged set nets

or either thereof, set forth in said answer, are or were the things which the plaintiff alleges in its complaint constitute an obstruction to the navigation of said river, or are the things or thing which plaintiff in its complaint complains. But in this regard plaintiff alleges that the things complained of in its complaint were and are designated in said defendant's answer as set nets.

XVI.

This plaintiff answering unto paragraph No. 18 of said cross-bill and complaint of said defendant H. S. McGowan denies that while defendant was operating or fishing for salmon or any fish his said alleged set nets, or either thereof or each of them or any of them, at the location or place where the same were located in the waters of the Columbia River or in Pacific County or in the State of Washington, or otherwise or elsewhere, or on or about the 2d or 3d of July, 1908, or at any time or at any other **[104]** date or dates or time or times since said date, this plaintiff, or its agent or agents or its officer or officers or servant or servants, unlawfully or wrongfully, or otherwise or at all, or without the consent of defendant or at all, entered upon the lateral passageway or location or upon the end passageway or the location of the defendant's said alleged set nets *of* each of them or either thereof, or upon or over the location of said alleged set nets or each of them or either thereof, or then or there or otherwise or at all unlawfully or wrongfully or without the consent of defendant, or otherwise or at all, with any drag seine or seines, or otherwise or at all, did fish

with said or any drag seines for the purpose of catching salmon fish in said seine or seines on the location of defendant's alleged set nets or set net or each of them or either thereof, or did catch salmon fish therein which otherwise would have been caught in the said alleged set nets, or each of them or either thereof, or has ever since said time, or at all, wrongfully or unlawfully or without the consent of defendant, or otherwise, daily or at all fished for the purpose of catching salmon fish or otherwise with its said drag seine or seines upon the lateral passageway or the location or upon the end passageway or location of defendant's said alleged set nets or each of them or either thereof, or upon or over the said alleged set nets or each of them or either thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof, or upon or over the said set nets or either of them or each thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof were defendant permitted to operate the same or either thereof. **[105]** But this plaintiff alleges that prior to the institution of this action it did enter upon its said property rights, namely said Sites 2 and 3, and did operate drag seines in front thereof and over the territory and locations claimed by the defendant herein as set net locations, and that it did so without the consent and against the protest of said defendant accordingly as plaintiff has alleged in its said complaint. This plaintiff denies, however, that thereby or otherwise

or at all the defendant is irreparably or at all damaging or injuring the defendant, or that the damages or any damage will amount to many thousands of dollars or to any sum or amount whatever; and denies that it is impossible to measure such alleged or any damage in money, or otherwise. This plaintiff admits that it is impossible to say how many fish plaintiff would or will catch in its drag seines, or how many fish it will daily catch therein before the seines are operated; but denies that it is impossible to say how many salmon fish the defendant would catch in his said alleged set nets or either thereof if permitted to operate the same, for that accordingly as the same were constructed and operated by said defendant no fish would be caught therein.

XVII.

This plaintiff answering unto paragraph No. 19 and 20 of said cross-bill and complaint admits that it will continue during the fishing seasons on the Columbia River, to daily fish for salmon fish and in front of said Sites 2 and 3 and over the territory claimed by the defendant as his set net locations so long as it has the right so to do from the owner of said Sand Island, namely the United States; but denies that said defendant has any set net location or right to have any set net location, or has any lateral passageway or end passageway to any set net location, or that **[106]** the defendant ever operated a set net thereon; and admits that this plaintiff claims the exclusive right to draw seines on and over the frontage to said Sites 2 and 3 on Sand Island; and denies that the defendant has any right to construct

or operate any fixed appliance or stationary obstruction in front thereof, but accedes the right in the defendant or in the public to use floating appliances for the purpose of catching salmon fish in any of the waters of said river; but denies that in the operation of said drag seines plaintiff has trespassed upon any right of the defendant; admits that this plaintiff will prevent the defendant, in so far as it can, without violating the law, from placing stationary appliances or structures or any fixtures in front of said Sites 2 and 3 that will, in any manner, prevent or interfere with the free ingress to and egress therefrom, or from the operation of drag seines in front thereof; but denies that the said defendant will thereby, or otherwise, be irreparably or at all damaged or that the damage to the defendant or any damage to defendant will amount to many thousands of dollars or any sum or amount, and denies that it is impossible to measure such alleged damage or damages; denies that it is impossible to ascertain how many fish defendant would catch in his said alleged set nets during the fishing season of this year or at any time, for that the same will not catch any fish accordingly as operated by defendant.

XVIII.

This plaintiff answering unto paragraph No. 21 of said cross-bill and complaint of said defendant H. S. McGowan, says that it is true and admits that on the 3d day of July, 1908, plaintiff endeavored to prevent and is now endeavoring to prevent defendant from operating his said alleged set nets where the same are located in front of said Sites 2 and 3,

and where the same [107] interfere with and obstruct the free ingress to and egress therefrom. This plaintiff denies that it claims the exclusive right of fishery in the Columbia River, but claims it has the exclusive right to operate drag seines in front of said Sites 2 and 3 and that no one has the right to prevent plaintiff from so doing by any obstruction placed in said waters in front thereof; and that plaintiff has, at all times, denied that defendant has any right to place in said waters in front of said sites at the place where defendant constructed the same the alleged set nets, described in said cross-bill and complaint.

XIX.

This plaintiff answering unto paragraph No. 22 of said cross-bill and complaint says that it is true and admits that it will, unless restrained by this Court, continue daily during the salmon fishing season only, to fish and operate its said drag seines upon and in front of said Sites 2 and 3 accordingly as alleged in its said complaint; but denies that the operation of the same will be upon the lateral location or end passageway of any set nets owned by defendant. This plaintiff also admits that it denies that defendant has any right to construct or operate any fixed appliance in front of said sites.

XX.

This plaintiff answering unto paragraph No. 21½ of said cross-bill and complaint denies that because said defendant has been enjoined in this suit or prevented from fishing for the purpose of catching salmon fish, or otherwise, each or all or any of his

said alleged set nets at the location or locations in said cross-bill and complaint mentioned, has been damaged in the sum of many thousand dollars or in any sum or amount or damaged at all; **[108]** denies that it is impossible to allege or state specifically the exact amount of money in which said defendant has been damaged; and denies that defendant has been damaged in any sum or amount; or that he has been damaged in the sum of at least $20,000.00 or in any sum or amount up to the present time, or at all; and denies that defendant has been damaged in any sum or amount whatever.

XXI.

This plaintiff answering unto paragraphs No. 23 and 24 of said cross-bill and complaint denies that defendant does not have a plain, speedy, or adequate remedy at law for the redress of the alleged grievances, or at all; and denies that an emergency exists; and denies that defendant is entitled to a permanent or any injunction forever or at all enjoining plaintiff from maintaining or operating said seines or any or either of them on the alleged lateral location or alleged end passageway of any of defendant's alleged set nets, or from interfering with defendant's right to fish or operate defendant's said alleged set nets, or either thereof.

XXII.

This plaintiff further answering unto the said cross-bill and complaint of defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said alleged cross-bill and complaint charged; without this there is no other mat-

ter, cause, or thing in said defendant's cross-bill and complaint contained, material, or necessary for this plaintiff to make answer to, and not herein and hereby well and sufficiently answered to, and confessed, traversed, and avoided or denied is true to the knowledge or belief of this plaintiff all of which matters and things this plaintiff is ready and **[109]** willing to aver, maintain, and prove as this honorable Court shall direct; and humbly prays to be hence dismissed as to the pretended cross-bill and complaint of this defendant, with its reasonable costs and charges in its behalf most wrongfully sustained; and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity.

G. C. FULTON,
Solicitor for Complainant. **[110]**

State of Oregon,
County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say: That I am vice-president of complainant in the above-entitled action; and that the foregoing answer is true, as I verily believe.

[Seal] SAMUEL ELMORE.

Subscribed and sworn to before me this 26th day of October, 1908.

G. C. FULTON,
Notary Public for Oregon.

State of Oregon,
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn on oath depose and say: That on October 27, 1908, I delivered to

Messrs. Welsh, Welsh and O'Phelan, attorneys for the defendants herein, a true, full and correct copy of the foregoing answer by depositing the same in the United States postoffice at Astoria, Oregon, inclosed in a sealed envelope, postage prepaid, addressed to said attorneys at South Bend, Washington.

[Seal] G. C. FULTON.

Subscribed and sworn to before me this 29th day of October, 1908.

W. M. VAN DUSEN,
Notary Public for Oregon.

Filed U. S. Circuit Court, Western District of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [111]

[Replication of H. S. McGowan to Answer to Cross-bill and Complaint.]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

H. S. McGOWAN'S REPLICATION TO THE ANSWER WHICH THE PLAINTIFF HAS FILED TO THE CROSS-BILL AND COMPLAINT OF H. S. McGOWAN.

To replication of H. S. McGowan to the answer which plaintiff has filed to the cross-bill and complaint of H. S. McGowan.

This replicant, H. S. McGowan, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the Columbia River Packers' Association, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said Columbia River Packers' Association, and that the answer of the said Columbia River Packers' Association is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this honorable Court shall direct and humbly prays as in and by his said cross-bill he hath already prayed.

WELSH, WELSH & O'PHELAN,
Solicitors for Defendant, H. S. McGowan. [112]

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say: That I am one of the defendants in the above-entitled action, and one of the cross-cómplainants therein. That I have read the above and foregoing replication and know the contents thereof, and that the same and the whole thereof is true as I verily believe.

H. S. McGOWAN.

Subscribed and sworn to before me this 18th day of December, A. D. 1908.

[Notarial Seal] GEO. HIBBERT,
Notary Public for the State of Washington, Residing at Chinook, in Said State. [113]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,
Defendants.

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

I, John T. Welsh, being first duly sworn upon my oath depose and say: That I am one of the attorneys

and solicitors for the defendant and cross-complainant H. S. McGowan in the above-entitled action.

That my place of residence and address is South Bend, Pacific County, Washington.

That G. C. Fulton is the attorney of record for the Columbia River Packers' Association, the plaintiff in the above-entitled action, and the place of residence and address and the office of said G. C. Fulton is Astoria, Clatsop County, State of Oregon.

That on the 24th day of December, A. D. 1908, I put in an envelope a true and correct copy of the foregoing attached replication in the above-entitled action and proceeding and then I sealed said envelope and prepaid the United States postage thereon in advance and then I wrote the following name and address on said envelope, namely: G. C. Fulton, Attorney at Law, Astoria, Clatsop County, Oregon, and then on said 24th [114] day of December, 1908, I deposited said envelope and its contents in the United States postoffice at South Bend, Washington.

That there is a daily communication of the United States mails to, from and between said South Bend, Washington, and said Astoria, Oregon, and that there is a United States postoffice at each of said places.

JOHN T. WELSH.

Subscribed and sworn to before me this 24 day of December, A. D. 1908.

[Notarial Seal] SOL. SMITH,

Notary Pubiic for the State of Washington, Residing at South Bend in Said State.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Dec. 26, 1908. A. Reeves Ayres, Clerk. ————, Deputy. **[115]**

[Stipulation for Omission from Transcript on Appeal of Original Bill, Pleadings of Defendants Lindstrom and Coyle, etc.]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Complainant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

IT IS HEREBY stipulated and agreed by and between the respective parties in the above-entitled cause that for the purpose of shortening the transcript on appeal, the pleadings filed in this cause on behalf of defendants, Erick Lindstrom and J. P. Coyle, and the pleadings of the plaintiff directed against the same, may be omitted for the reason that said pleadings are, in all respects, identical with the pleadings filed herein on behalf of defendant H. S. McGowan and with those filed by plaintiff directed against the pleadings of H. S. McGowan, save and except only that the approximate descriptions, loca-

tions and license numbers of defendants Lindstrom and Coyle are separately referred to and described in their said pleadings, said set net locations of defendant Lindstrom being numbered 1433, 1434 and 1435; and those of defendant Coyle being numbered 1436, 1437 and 1438, and located in the Columbia River off the southerly side of Sand Island below the line of ordinary low tide and above or to the northward of the Government's fairway or channel line whereat it is claimed by defendants fishing may be carried on with fixed appliances without special Government permits. **[116]**

Said fishery locations are further described as lying immediately to the southward below and in front of the low tide line which as claimed by defendants is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island.

And for the purposes and uses of said record, the pleadings of defendant H. S. McGowan and the pleadings of plaintiff directed against the same shall be deemed also to be the pleadings of defendants Lindstrom and Coyle and the pleadings of the plaintiff directed against the same, subject only to variations as to license numbers and descriptions, as aforesaid.

IT IS FURTHER stipulated that the original bill in equity may be omitted from the transcript for the reason that an amended bill was filed.

Dated this 3d day of December, A. D. 1913.

G. C. FULTON,
Attorney for Plaintiff.
WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [117]

[Petition of Plaintiff That Suit be Dismissed Without Prejudice.]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Defendants.

To the Honorable, the Circuit Court of the United States for the Western District of Washington, Western Division:

Comes now the above-named plaintiff, the Columbia River Packers' Association, and respectfully rep-

resents and shows to this honorable Court as follows, that is to say:

That your petitioner instituted the above-entitled suit in the above-entitled court for the purpose of securing an injunction enjoining and restraining the defendants from trespassing upon the proprietary rights of the petitioner on, in and to and depriving him of the use and enjoyment of that certain tract of land and real property situated on the south shore of Sand Island (for a more particular description of said lands and property rights, reference is hereby made to the amended complaint filed herein), an island in the Columbia River, near its mouth, and lying south of the north ship channel of said river.

That said Sand Island is the same tract of land and the same Sand Island that is described and mentioned in the opinion of the Supreme Court of the United States in the suit hereinafter mentioned wherein the State of Washington was claimant and the State of Oregon was defendant.

That your petitioner instituted this suit in perfect good faith.

That, at and long prior to the institution of this suit, the officials of the State of Washington, both executive, [118] judicial, and legislative contended that said Sand Island was wholly within the *the* territorial limits and jurisdiction of the State of Washington, and denied that the State of Oregon, or its officers, executive, judicial, or legislative, had or could exercise any jurisdiction thereover and contended that the south boundary line of the State of Washington was the middle of the channel of the

Columbia River located immediately south of said Sand Island.

That said claims of exclusive jurisdiction over said island had been asserted as aforesaid and acted upon and sustained by the officials and courts of the State of Washington for many years prior to and were being so asserted and sustained at the time of this suit.

That pursuant to said claim the citizens of said State of Washington, and the officials thereof, at all times prior to the decision of the Supreme Court of the United States herein mentioned, had taken possession of and exercised exclusive dominion over all the fisheries and fishing rights pertaining to said Sand Island, and over all the water north of the south channel of the Columbia River, and asserted and assumed to exercise exclusive jurisdiction thereover.

That by reason of the acts and claims of said State of Washington and its officials and citizens your petitioner was advised and was led to believe that said Sand Island was within the territorial boundaries and jurisdiction of the State of Washington, and by reason thereof it instituted this suit in the above-entitled Court expecting and intending to maintain the same and prosecute it to final determination.

That since the institution of the above-entitled suit by consideration of the Supreme Court of the United States [119] duly rendered and entered on the 16th day of November, 1908, in the said cause wherein the State of Washington was claimant and the State of Oregon was defendant, it was held and judicially determined by said Supreme Court of the United States, that the boundary line between the

State of Washington and the State of Oregon is and at all times has been the north ship channel of the Columbia River and is located north of said Sand Island; and that said Sand Island is and at all times has been within the territorial limits and is a part of the territory of the State of Oregon.

Your petitioner therefore respectfully suggests that this Court has not the jurisdiction over the subject matter of this suit and by reason thereof your petitioner respectfully prays that this suit be dismissed, without prejudice.

THE COLUMBIA RIVER PACKERS' ASSOCIATION,

Petitioner.

By C. W. FULTON,
Of Its Attorneys.

C. W. & G. C. FULTON,
Attorneys for Petitioner. [120]

United States Circuit Court, Western District of Washington, Western Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN et al.,

Defendants.

Filed ————

Opinion on Plaintiff's Motion to Dismiss for Want of Jurisdiction.

C. W. & G. C. FULTON, for Plaintiff.

WELSH, WELSH & O'PHELAN, for Defendants.

W. P. BELL, Attorney General of the State of Washington, Amicus Curiae.

DONWORTH, District Judge:

This is a suit in equity begun originally in this court in July, 1908. The plaintiff is a corporation organized under the laws of the State of Oregon and the defendants are citizens and residents of the State of Washington. The object of the suit is to obtain an injunction restraining the defendants from placing in any of the waters of the Columbia River in front of or adjacent to certain premises described as Sites Nos. 2 and 3 on Sand Island, and from maintaining in front of said premises in said waters any obstruction whatever, particularly certain obstructions alleged in the complaint to be there maintained by the defendants, and from interfering with the free and uninterrupted ingress to and egress from said premises. There is also a prayer that all obstruction placed in said waters in front of said premises be abated, and that the defendants be required to remove the same and for general relief. The amended complaint filed August 11, 1908, alleges that the United States is the owner of "that certain tract of land situated and located, within the County of Pacific in the State of Washington, the [121] same being an island in the Columbia River near the mouth of said River, which was and is generally

known and named upon all official records, maps and plats as Sand Island," and that pursuant to an act of Congress granting authority to the Secretary of War for that purpose, the plaintiff holds a valid lease for those certain portions of Sand Island designated on the maps and plats of the Government survey, as Sites Nos. 2 and 3, for the term of three years from May 1, 1908, "together with the tide lands water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River." It is further alleged that "said Sites 2 and 3 aforesaid, are on the south side of said Sand Island and are on the north shore of the main ship channel of the Columbia River, and within the jurisdiction of this Court, and within the Western District and Western Division thereof." It is also averred that "under the laws of the United States the said waters are required to be kept free from obstructions and that by virtue of said laws, and said lease aforesaid, plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed, and is entitled of right to the free, unobstructed ingress to and egress from said premises, and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores." The acts of the defendants constituting the alleged interference with plaintiff's rights are set forth in the amended complaint as follows:

> "That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters

and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and [122] under the same lease aforesaid, when the *the* defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting of *large to* which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from

operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say that each of said obstructions consisted of a large stone or stones of great weight to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore.

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress from said

premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any practical use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and each is an obstruction to the navigation of said river. * * * [123]

* * * That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent plaintiff from ingress to and egress from said premises."

On the filing of the complaint the Court fixed a time for hearing the application for an injunction pending the suit and at the same time issued a restraining order restraining the defendants "from in any manner interfering with the free ingress to

and egress from, and from placing and maintaining any obstruction or anchor or killock, or any timber, log, or appliance that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Nos. 2 and 3 on Sand Island." This order has not been dissolved. At the time of its issuance plaintiff was required to file an injunction bond in the penal sum of two thousand dollars.

Thereafter the defendants appeared and filed separate answers wherein, after denying and admitting certain of the allegations of the amended complaint, extensive affirmative matter is set forth. Briefly stated, the allegations of the defendants are to the effect that their acts in the premises were and are *bona fide* operations for the purpose of catching salmon fish by means of set nets under licenses issued by the Fish Commissioner of the State of Washington; that the objects maintained by them in the river in front of Sand Island were below the line of extreme low tide and were put and kept there for the purpose of operating said set nets and marking and holding the location thereof; that each set net was located by a stone anchor weighing about three hundred pounds, to which was attached a piece of chain about five feet long clamped to a wire rope about 25 feet long, and that to this was attached a cedar buoy about 4 feet long and [124] 8 inches square, upon which buoy was securely fastened the license number of each location. The affirmative portions of the answers set forth with a good deal of detail the facts upon which the defendants base their claim of the

right to maintain and operate nets and to prosecute the business of salmon fishing in this location. They further allege wrongful acts in the premises on the part of the plaintiff and pray affirmatively for relief by way of injunction for the purpose of preventing any interference by the plaintiff with their set nets, and necessary appliances. There are allegations of diverse citizenship and other allegations showing the purpose of the defendants to set forth a complete cause of action on their part against the plaintiff.

At the time of the commencement of the suit and the issuance of the restraining order and also at the time of the filing of the amended complaint and of the answers, both parties assumed and believed that the boundary between the States of Oregon and Washington was in the middle of the main ship channel of the Columbia River south of Sand Island, thus placing the island, and its shores, and the waters involved in this controversy wholly within the State of Washington. The location of the interstate boundary was at that time in litigation in a suit begun in the Supreme Court on February 26, 1906, by the State of Washington against the State of Oregon. That suit was decided by an opinion delivered May 24, 1909. Washington vs. Oregon, 213 U. S. ——. Since the final decision of the Supreme Court, the plaintiff has moved this Court to dismiss the pending suit for want of jurisdiction on the ground that the suit is a local one and concerns real estate and property situated in the State of Oregon and therefore not within the Western District of [125] Washington. The motion is registered by the defendants.

The question of jurisdiction has been fully argued and is now to be decided.

In view of the decision of the Supreme Court in the boundary suit between the two States, I must hold that Sand Island and the shores and waters constituting the place involved in this controversy, are south of the boundary line and lie within the State of Oregon. Counsel for defendants have urged with much vigor that the present Sand Island is not the same island as the one described by that name in the opinion of the Supreme Court. They assert that the Old Sand Island entirely disappeared several years ago and that the present island, bearing the same name, formed later by the action of the tides and currents, is north of the line which the Supreme Court has fixed as the boundary. They ask a reference to a Master for the purpose of ascertaining the facts in this regard. The answer to this contention is that the Supreme Court has clearly decided that the boundary is the channel north of the present Sand Island. In the opinion on petition for rehearing it is said: "There are practically two matters presented; one whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons, therefore." Wash. vs. Ore., 213 U. S. ——. There is no doubt whatever that this decision fixes the boundary north of the Sand Island that now exists, and I so hold.

This brings us to the further inquiry whether this Court has jurisdiction to hear and determine this

cause and to enforce its decree therein by virtue of the legislation of Congress relating to concurrent jurisdiction on the Columbia River. [126] In Nielsen vs. Oregon, 212 U. S. 215, 316, that legislation is briefly summarized as follows:

> "By par. 1 of the act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the Territory of Oregon lying north of the 'main channel of the Columbia River' was organized into the Territory of Washington, and by par. 21 of the same act it is provided 'that the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms the common boundary between said territories.' Section 1 of the act of Congress admitting Oregon into the Union (act of February 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the State, provides, 'including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State.' And in par. 2 it is said 'the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same."

The constitution of the State of Washington defines the State boundaries and makes no mention of

concurrent jurisdiction on the Columbia River, but, as will be shown later, the State has not lost such jurisdiction by reason of its failure to assert it by positive enactment. The territorial jurisdiction of this Court is defined in the act dividing Washington into two judicial districts. That act provides that certain counties lying east of the Cascade Mountains, with the waters thereof, shall be detached from the judicial district of Washington, and "that the residue of said State of Washington with the waters thereof, shall hereafter be the Western District of Washington." 33 U. S. Stat. pt. 1, 824. This language is ample to vest in this Court as broad a jurisdiction over that part of the Columbia River involved in this controversy as any State court might exercise, and is *to read* in connection with the former legislation of Congress above mentioned.

In Nielsen vs. Oregon, *supra,* it is said: [127]

> "By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either State, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to 'civil and criminal cases,' but in the second section of that act there was given in general terms 'concurrent jurisdiction.' In Wedding vs. Meyler, 192 U. S. 573, 584, construing the term 'concurrent jurisdiction,' as

given to Kentucky and Indiana over the Ohio River, this Court, reversing the Court of Appeals of Kentucky, said:

'Concurrent jurisdiction, properly so called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See Sanders vs. St. Louis & New Orleans Anchor Line, 97 Missouri, 26, 30; Opsahl vs. Judd, 30 Minnesota, 126, 129, 130; J. S. Keator Lumber Company vs. St. Croix Boom Corp., 72 Wisconsin, 62, and the cases last cited.

'The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words "meant only that the States should have legislative jurisdiction." But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. Vicat Vocab., sub. v. See Rhode Island vs. Massachusetts, 12 Pet. 657, 718. What the Virginia compact most certainly conferred on the States north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. State vs. Mullen, 25 Iowa, 199, 205, 206.'

Undoubtedly, one purpose, perhaps the primary purpose in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted

was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. * * * But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the States."

In State vs. Mullen, 35 Iowa, 199, the Court sustained the conviction in Iowa of a person charged with maintaining a nuisance on a boat in the Mississippi River, although the boat was, for a portion of the time, resting on the soil of an island near to the Illinois shore, and within the territorial limits of Illinois. The rights of concurrent jurisdiction on the Mississippi River were substantially the same as on the Columbia. [128]

The Court said:

"If this boat is so upon the river that the person maintaining it there is amenable to the laws of this State, and our courts have jurisdiction to try and punish him for keeping a nuisance, it is a logical sequence that this jurisdiction must draw after it every thing necessary to make it effective and complete. We must either concede the right to abate the nuisance, or deny the right to try and punish the defendant for maintaining it.

A denial of the 'drop of blood' is equally a denial of the 'pound of flesh.' It is claimed that to allow the officers of the State to seize this boat *would an* invasion of the sovereignty of

the State of Illinois. If the defendant may be tried by the courts of this State for an act done upon the boat, it must follow that the officers of this State may arrest him upon the boat for the purpose of bringing him before the Court for trial. It would be inconsistent to say that the locus of a crime is within the jurisdiction of a court for the trial of an offense, and yet beyond it for the arrest of the offender. If the officers of this State may lawfully go upon the boat for the arrest of the defendant, why may they not lawfully do so for the seizure of the boat itself? If one is not an invasion of the sovereignty of the State of Illionis, why is the other?"

As above shown, this case is cited with approval in Wedding vs. Meyler, 192 U. S. 573, 585. In the Annie M. Smull, 2 Sawyer, 226 (Fed. Cas. No. 423), which is perhaps an extreme case, District Judge Deady sustained the jurisdiction in admiralty of the District Court of Oregon over a vessel moored at a wharf at Kalama on the Washington shore. See, also, in addition to cases cited above, Memphis Packet Co. vs. Pikey, 142 Ind. 304 (40 N. E. 527), and State vs. Faudre, 46 S. E. 269. Nor was it necessary that the State of Washington should by its constitution or otherwise assert its concurrent jurisdiction by expressly accepting the congressional enactments. "It must be remembered that this was legislation, and when it is enacted by the sovereign power that new States, when formed by that power, shall have a certain jurisdiction, those States as they come into existence fall within the range of the en-

actment and have the jurisdiction." Wedding vs. Meyler, 192 U. S. 573, 583.

It is of course clear, as held in the case last cited, [129] that the concurrent jurisdiction given is jurisdiction "on" the river and does not extend to permanent structures attached to the river bed and within the boundary of the other State. Plaintiff's counsel urge that the present case does not involve things "on" the river and contend that the cases of Gilbert vs. Moline Water Power Co., 19 Iowa, 319, and M. & M. Railroad Co. vs. Ward, 67 U. S. 485, are controlling. To me, however, it seems clear that the parties in this case are here contending about things "on" the river. I have set forth with some fullness their respective allegations and claims and do not consider any extended reasoning necessary to demonstrate that the subject matter of the litigation is within both the letter and the spirit of the congressional enactments. The only objects involved which by any possible theory could be considered permanent structures are the stone anchors, and I cannot assume that the stones at the bottom of the river are the only or even the principal things concerned in the controversy. If it should be held that the mere fact of anchoring a floating object takes it out of the grant of concurrent jurisdiction, there would be little left of that jurisdiction. It is not necessary, in order to uphold the jurisdiction, that the Court have power to administer all of the relief asked; it is sufficient if the facts alleged show a substantial controversy between the parties within the jurisdiction of the Court. It is also urged that the case of Roberts vs. Fullerton,

117 Wis. 222 (93 N. W. 1111), is in point and is opposed to the views above stated. The question there involved, however, was chiefly legislative rather than judicial jurisdiction, and were it not so, I should in any event, feel bound by the decisions of the Supreme Court, to sustain the jurisdiction of this Court in the present case. Many nice questions must arise from conflicting State legislation [130] in these cases and I express no opinion at this time as to what law defines the rights of the parties at the place in controversy. But as between courts of concurrent jurisdiction the court that first acquires jurisdiction holds it to the exclusion of all others. The question as to what law will be the rule of decision between the parties relates to the merits and not to the jurisdiction.

If at the time of the commencement of this action the Court possessed the definite knowledge of the actual location of the State boundary which it now has, it is perhaps probable that the exercise of judicial discretion and with due regard for the comity of courts, the restraining order and injunction applied for would have been refused, leaving the plaintiff to seek a remedy in the courts sitting in the State of Oregon. But a different situation is now to be met. By reason of the action of the plaintiff in beginning suit in this court and obtaining the restraining order, the defendants have been prevented for an entire year from making any use of such nets and appliances as they may have had or may have purposed to have on the premises. If it should develop that they are in the right of the controversy (which is obviously a thing that cannot be known at this time) they

should not be deprived of such remedy as they may have under the injunction bond, or otherwise, for yielding obedience to the orders of a court which, under the legislation of Congress, was a court of competent jurisdiction.

Numerous reasons may be assigned for the action of Congress in granting concurrent jurisdiction to new States bounded by the great rivers; and though there are obvious difficulties, the conveniences far outweigh the disadvantages. The circumstances of the present case vindicate the wisdom of the [131] enactment. Valuable rights being in controversy in a situation near to the boundary line between the two States, and there being no process other than the writ of injunction that would prevent the use of force in the assertion of the divers claims, this suit was brought in this court on the assumption that the location was within its jurisdictional limits. In my opinion, the grant of concurrent jurisdiction sustains the right of this Court to hear and determine the controversy and to enforce its decree, regardless of the fact that by judicial determination the actual boundary is now found to be so situated as to place the location of the controversy in the other State. To decline to retain jurisdiction of this suit would be to refuse to apply the congressional enactment to a case peculiarly within the reason for its existence.

The motion to dismiss is denied.

GEORGE DONWORTH,
Judge.

Filed U. S. Circuit Court, Western District of Washington. Sep. 10, 1909. A. Reeves Ayres, Clerk. ————, Deputy. [132]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1385–C.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, J. P. COYLE and ERICK LINDSTROM,

Defendants.

Order Denying Petition of Plaintiff to Dismiss.

The above-entitled cause having been heretofore argued and submitted to the Court upon the petition and motion of the plaintiff to dismiss this action for want of jurisdiction in this Court to try the case, and the Court, not being fully advised in the premises at the time said argument was made, took the same under advisement until this day.

Now, on this day, the Court being fully advised, it is ORDERED that said motion be and the same is hereby overruled and denied.

It appearing to the Court that this order was made on the 10th day of September, 1911, but through a mistake and oversight, the same was not entered of record that date.

It is ORDERED and ADJUDGED by the Court that this order be and the same is hereby entered as of such date.

EDWARD E. CUSHMAN,
Judge of U. S. District Court, for Western District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 31, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[133]**

In the Circuit Court of the United States, Western District of Washington, Western Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN et al.,
Defendants.

Order Allowing Filing of Supplemental Bill of Complaint, etc.

Now on this date, coming on to be heard the above-entitled suit upon stipulation filed herein signed by the attorneys for the respective parties granting the plaintiff the right to file its proposed supplemental bill of complaint, and granting the answering defendants the privilege of filing an amended or supplemental answer and an amended or supplemental cross-bill or either or all, by either or all of the defendants: the plaintiff appearing by

Honorable G. C. Fulton, and the defendants by Messrs. Dorr & Hadley, and Messrs. Welsh & Welsh, and based upon said stipulation.

IT IS ORDERED that said plaintiff be and is hereby allowed to file its supplemental bill of complaint heretofore offered and that the defendants shall have thirty (30) days from October 17th, 1910, in which to plead thereto.

IT IS FURTHER ORDERED that the answering defendants or any of them are hereby allowed to file an amended or supplemental answer and are also allowed to file a supplemental or amended cross-bill or either or both.

IT IS FURTHER ORDERED that the time in which the said defendants shall file such amended or supplemental pleadings **[134]** is thirty days from October 17th, 1910, and plaintiff shall have thirty days after service of any such amended or supplemental pleading in which to plead thereto.

GEORGE DONWORTH,
Judge, Circuit Court.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 19, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. **[135]**

In the Circuit Court of the United States for the Western District of Washington, Western Division.

IN EQUITY.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,
Defendants.

Supplemental Bill of Complaint.

To the Honorable Judges of the Above-entitled Court:

The above-named complainant by this its supplemental bill of complaint filed herein by leave of Court first had and obtained alleges:

I.

That on or before the —— day of July, 1908, your orator exhibited his original bill of complaint in this honorable Court against H. S. McGowan, Erick Lindstrom, J. P. Coyle, Walter Bussey, and I. N. Stensland, defendants herein, as defendants thereto thereby stating that the plaintiff is a corporation duly organized and existing under and pursuant to the laws of the State of Oregon and duly licensed and empowered as such to transact business in the State of Washington in accordance with the laws of said State; and further stating that defendants are citizens of the State of Washington and of the Western

District thereof and of the Western Division thereof; and further stating that long prior to the institution of said suit and the grievances therein complained of the United States of America was and still is the owner in fee of that certain island situated near the mouth of the Columbia River which was and is generally known and named upon all the official records, **[136]** maps, and plats as Sand Island, together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; and further stating that said Sand Island was by proclamation of the President of the United States duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations, and the same is and ever since has been held and reserved as such by the United States; and further stating that said Sand Island was situated and located within the County of Pacific in the State of Washington; and further stating that pursuant to an act of Congress approved July 23, 1892 (27 Stat. 321) granting authority to the Secretary of War to lease for a period not to exceed five years such property of the United States under his control as should not for the time be required for public use duly and in the manner required and provided by law on the first day of May, 1908, duly leased to plaintiff Sites No. 2 and 3 on said Sand Island for the term of three years from said date, together with the tide lands, water rights, riparian rights, and fishing rights adjacent thereto; and further stating that the portion of said island so leased aforesaid, and being Sites No. 2 and

3 was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn at the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on said island by the United States Government surveyors, and so marked, thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south line 781 **[137]** feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked; and further stating that upon the execution and delivery of said lease the plaintiff immediately entered into the possession of said premises and the whole thereof, and the said premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark, consist of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no mineral or phosphates of any kind. That the bed of said river below low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites No. 2 and 3 aforesaid are on the south side of said Sand Island and further stating that the same are on the north shore of the main ships' channel of

the Columbia River and within the jurisdiction of this Court and of the Western District and of the Western Division thereof, and the same were and are of great value as and for the right to draw seines thereon and thereover and in the waters in front thereof, and were leased to plaintiff for such purposes; and further stating that plaintiff was duly licensed to operate three seines on said island; and further stating that plaintiff made all preparations necessary to do so and in order to operate the same it was necessary that no obstructions should be placed in the waters of said river in front of said premises; and further stating that plaintiff was preparing to operate seines in the waters in front thereof and to haul the same on the shore of said Sites 2 and 3 when the said defendants wrongfully and unlawfully and against its consent and without right placed divers and sundry obstructions in front of said **[138]** premises so that the plaintiff was unable to operate its said seines and threatened to *maintained* such obstructions and would so maintain the same unless restrained by this Court; and further stating that said premises are and at all times have been of great value for the right of fishery thereon and the right to haul and land seines thereon and in front thereof and to operate seines from the shore into the waters of the Columbia River and to haul the same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river; and stating that under the laws of the United States the said waters are required to be kept free from all obstructions

and that said obstructions were not placed therein by virtue of any authority from the United States or any official thereof or department thereof.

II.

Your orator further shows that said defendants, H. S. McGowan, Erick Lindstrom, and J. P. Coyle, being duly served with process of subpoenas, appeared to your orator's said bill and put in their separate answers thereto, whereby each alleged and admitted that said Sand Island and the said premises mentioned in plaintiff's bill of complaint were situated within the County of Pacific and in the State of Washington, and that thereupon it appears from the bill of complaint filed herein and the answers of said defendants as well as the cross-bills which said defendants filed with said bill of complaint, and each of said cross-bills filed by each of said defendants, that said Sand Island and said Sites No. 2 and 3 thereon and the premises in controversy were situated in the County of Pacific in the State of Washington; and now your orator shows by way of supplement that your orator has lately discovered, as the fact is, that the said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole **[139]** of each thereof and the waters surrounding same are not within the County of Pacific and are not within the State of Washington, but that said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole thereof and the waters surrounding the same are and at all times have been wholly included within the County of Clatsop and within the State of Oregon, and are and at all times

have been without and beyond the territorial boundaries of the State of Washington.

III.

Your orator further alleges and shows to this Honorable Court that at the institution of this suit and at the filing of said bill of complaint, for many years prior thereto, the said Sand Island had ever been contended by the citizens and the officials of the State of Washington to be wholly within the boundaries of the State of Washington, and that such claim was practically admitted by the citizens of the State of Oregon, and the Fish Commissioner of the State of Washington at all times held that said Sand Island was included within the territorial boundaries of said State of Washington and the Master Fish Warden of the State of Oregon at all times conceded that the said Sand Island was wholly within the territorial boundaries of the State of Washington and recognized and accepted licenses issued by the Fish Commissioner of the State of Washington for seines used and employed on Sand Island and did not attempt to collect or profess to collect any licenses for seines operated on said island, and your orator at all times believed that the said Sand Island was wholly within the boundaries of the State of Washington until heretofore and on the 16th day of November, 1908, in a suit brought by the State of Washington in the Supreme Court of the United States against the State of Oregon for the purpose of determining the boundary line between the State of Oregon and [140] *and* the State of Washington, in which suit the State of Oregon was duly and regularly served with subpoena and process and duly

appeared and answered, and after a trial was duly had on the merits adjudged and decreed the boundary line between the State of Washington and the State of Oregon was north of said Sand Island and between the said Sand Island and the north shore of the Columbia River; and further adjudged and decreed that said Sand Island was wholly within the State of Oregon and was within the territorial boundaries thereof.

Your orator therefore alleges by this, its supplemental bill, that the said Sand Island is now and at all times has been within the County of Clatsop and in the State of Oregon and is not and never has been within the County of Pacific or within the State of Washington and is not and never has been within the territorial boundaries of the State of Washington; and your orator further alleges that it is informed and believes and therefore avers that this Court has no jurisdiction over this suit.

WHEREFORE your orator respectfully prays:

First: That if the Court shall be of the opinion that it has jurisdiction in the premises and of this suit, your orator have such judgment and decree as prayed for in its original bill of complaint; and

Second: That should the Court be of the opinion that it has no jurisdiction of this suit that this suit be dismissed and plaintiff go hence without day.

C. W. FULTON,
G. C. FULTON,
Attorneys for Plaintiff.

COLUMBIA RIVER PACKERS' ASSN.,
GEO. H. GEORGE,
Vice-Pres. **[141]**

State of Oregon,
County of Clatsop,—ss.

I, Geo. H. George, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled suit; and that the foregoing supplementary complaint is true, as I verily believe.

[Seal] GEO. H. GEORGE.

Subscribed and sworn to before me this 14th day of September, 1910.

G. C. FULTON,
Notary Public for Oregon, Residing at Astoria, Oregon.

Commission expires Dec. 11th, 1911.

State of Oregon,
County of Clatsop,—ss.

Due service of the within supplemental bill of complaint is hereby accepted in said county and State, this 15 day of September, 1910.

DORR & HADLEY, and
WELSH & WELSH,
Attorneys for Defendants.

Filed U. S. Circuit Court. Western District of Washington. Sep. 10, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. **[142]**

In the Circuit Court of the United States for the Western District of Washington, Western Division.

No. ——.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,
Defendants.

Separate Answer of H. S. McGowan to Supplemental Bill of Complaint, Supplemental Answer to Original Bill of Complaint, and Supplemental Cross-bill.

The answer of H. S. McGowan, one of the defendants to the supplemental bill of complaint of the Columbia River Packers' Association, Plaintiff.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, says:

This defendant admits that the plaintiff filed its original bill of complaint in this Honorable Court at the time therein alleged, and against the defendants,

and substantially alleging the matters and things now averred in plaintiff's said supplemental bill. Admits that defendant appeared and filed his answer and cross-bill, wherein it was admitted and averred that said Sand Island, and the fishing sites in controversy in this suit, were situated in Pacific County, in the State of Washington.

By way of further answering the plaintiff's said supplemental **[143]** bill, this plaintiff denies the allegation that said Sand Island, and the whole thereof, and the fishing Sites 2 and 3, and the whole thereof, and the waters surrounding them, are not now wholly within the State of Washington. Defendant denies that said Sand Island, or any part thereof, or the said Sites 2 and 3, or any part thereof, or the waters surrounding them, or any part thereof, have at all times been, or now are, included within the County of Clatsop, or within the State of Oregon, or without the territorial boundaries of the State of Washington.

This defendant admits that at the time of the institution of this suit, and for many years prior thereto, said Sand Island had been contended by the citizens and officials of the State of Washington, and admitted by the officials of the State of Oregon, to be wholly within the boundaries of the State of Washington, and that the Fish Commissioner of the State of Washington had collected license fees and issued fishing licenses for fishing seines and other fishing gear used and employed at and about Sand Island.

This defendant admits that a suit was brought in

the United States Supreme Court by the State of Washington against the State of Oregon for the purpose of determining the boundary line between said States, and that a decision in said boundary line suit was rendered by said Supreme Court on or about the 16th day of November, 1908, but denies that by said decision or otherwise or at all it appears or is true that said State boundary line now, at this time, lies to the northward of said Sand Island, and denies that said Sand Island, or any part thereof, is now within the territorial limits of the State of Oregon, or without or beyond the territorial limits of the State of Washington. [144]

Further answering, this defendant avers and charges the truth to be that by the said decision of the Supreme Court in said boundary line suit, the true boundary line between the States of Oregon and Washington is the center of the north ship channel of the Columbia River at and in the vicinity of said Sand Island, changed only, as it may be from time to time, through the process of accretion, and this defendant further avers that while it is true that at times in the past, there was a so-called north ship channel in said river, which lay to the northward of said Sand Island, yet, in truth and in fact, the waters of said north channel have since entirely shifted their course and position to the southward of said Sand Island, and that, at the present time, there is no ship channel and no channel at all to the northward of said Sand Island, and that the said so-called north channel which was referred to in the opinion of said Supreme Court in the said boundary line suit, is now, and at

this time, wholly to the southward of said Sand Island.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the said plaintiff's said bills of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. [145]

FURTHER AFFIRMATIVE DEFENSE.

By way of a further and supplemental answer and affirmative defense to plaintiff's original and supplemental bills of complaint herein, this defendant avers and charges the truth to be, that on the 19th day of June, 1908, and before any of the fishing licenses had been issued to plaintiff, under which plaintiff is attempting to claim the premises in controversy in this suit, and during the time that said boundary line suit was pending between the States of Oregon and Washington in the Supreme Court of the United States and before the decision of said Court in said boundary line suit was rendered, this defendant did, as a precautionary measure, and for

the purpose of protecting his rights in and to those certain set net fishing locations claimed by him, duly apply to the Master Fish Warden of the State of Oregon, he being the proper and only official of that State having authority to issue fishing licenses for the State of Oregon, for the issuance to defendant of four set net licenses for fishing within the territorial waters of the Columbia River, within the State of Oregon; that this defendant paid the license fees required by the State of Oregon for such fishing licenses, and that on the said 19th day of June, 1908, said Master Fish Warden of Oregon duly issued to this defendant four set net licenses numbered *respectfully* 142, 143, 144 and 145 of the set net fishing licenses of the State of Oregon, and that this defendant held said licenses, and all of them, at all times since the said 19th day of June, 1908, and that said licenses were in full force and effect, at all times after said date for one year, or until long after the time of the rendition of the decision of the Supreme Court in said boundary line suit. **[146]**

This defendant further avers that he has, agreeably to the laws and customs of the State of Washington, duly and seasonably and annually renewed his said two set net licenses, and each of them, which were issued to him by the Fish Commissioner of the State of Washington on the 15th day of April, 1908, as described in his original answer herein, and under which his said fishing locations were taken and held prior to the attempted occupation of the fishing grounds, in controversy, in this suit, by the plain-

tiff, and that said renewal licenses for the current year are now in full force and effect.

SUPPLEMENTAL CROSS-BILL.

For his supplemental cross-bill, this defendant hereby adopts and repeats all of the foregoing matters and things hereinbefore averred and charged.

WHEREFORE, this defendant prays as in his original answer and cross-bill herein.

DORR & HADLEY,
WELSH & WELSH,
Solicitors for Defendant, H. S. McGowan.

State of Washington,
County of Pierce,—ss.

H. S. McGowan makes solemn oath and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

H. S. McGOWAN. [147]

Sworn to before me this 10th day of November, A. D. 1910.

[Notarial Seal] C. D. SAVERY,
Notary Public in and for the State of Washington, Residing at Tacoma.

Filed U. S. Circuit Court, Western District of Washington. A. Reeves Ayres, Clerk. By Sam'l. D. Bridges, Deputy. [148]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,
Defendants.

Order Appointing Special Examiner.

Upon reading and filing notice of motion for the appointment of a master or referee herein, with admission of service thereof, it is ordered by the Court that Charles D. Savery be and he is hereby appointed special examiner herein under the 67th rule as amended. The said special examiner shall take the testimony in behalf of both plaintiff and defendants, and is authorized to take the same in the City of Tacoma, District of Washington, or elsewhere according to the stipulation of parties, the taking of the testimony of the plaintiff to be commenced not later than the 20th day of September, A. D. 1910, and to be continued from time to time until completed, and thereafter the testimony of the defendants to be taken according to the convenience and requirements of the parties, at Tacoma or at such other place as they may stipulate. Said testimony shall be given orally by witnesses and be taken down stenographi-

cally by a skilled stenographer approved by the parties or appointed by the Court, and thereafter reduced to typewriting and when subscribed by the witnesses (unless such subscribing be waived) and duly certified, the same shall be admitted in evidence.

Done in open Court in the City of Tacoma, District of Washington, **[149]** Western Division, this 29th day of August, A. D. 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Aug. 29, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. **[150]**

[Request of Donworth, District Judge, That Counsel Appear for Further Hearing.]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN,
Defendant.

* * * * * * * *

* * * * * * * *

C. W. & G. C. FULTON, for the Several Complainants.

WELSH & WELSH, DORR & HADLEY, HERBERT W. MEYERS and C. C. DALTON, for the Several Defendants.

DONWORTH, District Judge:

I have read the testimony and exhibits in the above-entitled causes and have given the law applicable to the facts such consideration that I will be able to decide the cases promptly after a number of points upon which I desire further light from counsel are cleared up. I, therefore, request counsel in the several cases to appear in court at Seattle at some early date to be agreed upon by them to make clear certain points which have escaped me on account of the lapse of time since the oral argument. If practicable I would like to have this further hearing take place during the week beginning January 8th, not earlier than Tuesday of that week. I shall be in Tacoma on Monday the 8th, and in Seattle the rest of the week.

GEORGE DONWORTH,
District Judge. **[151]**

[Endorsed]: Filed U. S. District Court, Western District of Washington. Jan. 6, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy. **[152]**

In the United States District Court, Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Complainant,

vs.

H. S. McGOWAN et al.,
Defendants.

Memorandum Decision on Final Hearing.

C. W. & G. C. FULTON, for Complainant.
WELSH, WELSH & O'PHELAN and DORR & HADLEY, for Defendants.

DONWORTH, District Judge:

This is a suit in equity originally begun in the United States Circuit Court for the Western Division of this District, and by operation of law the case is now in this court for decision.

Complainant, as the lessee of certain sites on Sand Island in the Columbia River, sues to enjoin the defendants from constructing and maintaining in the waters of that river, below low-water mark, certain fishing appliances known as "set nets," placed there by defendants and held in place by stone anchors, to which were attached chains and buoys. At a former hearing it was held that the Circuit Court of this District had jurisdiction of the suit although Sand Island and the location in controversy were and are on the Oregon side of the boundary dividing that State from the State of Washington. Columbia

River Packers' Association vs. McGowan, 172 Fed. 991. The principal facts are stated in the former opinion. **[153]**

In the limited time at my disposal I am not able to prepare an opinion properly setting forth the reasons by which I have arrived at a conclusion on the merits, and citing the authorities which I have considered. This memorandum, however, will indicate my views on the chief points involved.

1. I adhere to the views expressed in the former opinion (173 Fed. 991), that the location in controversy is within the limits of the State of Oregon.

2. By a reasonable construction of the statute of the State of Oregon ceding Sand Island to the United States and the lease which the United States made to complainant, complainant's rights as lessee extend to the line of ordinary low water.

3. The right of fishery being a common right, no person has an exclusive right in the absence of a statute to fish in any particular waters of the Columbia River. The regulation of this common right as between different individuals is a matter governed by the State statute. It is for the State to say by its statutes what methods of fishery may be employed and how, where and when the different individuals may fish, subject to the paramount laws of the United States for the protection of navigation which are not involved here. A person complying with the provisions of the statute obtains thereby a legal right to fish in the location which the statute authorizes him to appropriate, it being a necessary consequence of the right to regulate that individuals who comply

with the regulations obtain at least a present right to hold and occupy particular locations for fishing purposes. The premises leased by complainant are so situated that it can conveniently prosecute the business of salmon fishing by means of drag seines drawn through the water in front of the premises and hauled upon the [154] shore. No person other than complainant can use the shore at this point for drag seine operations, because to do so would be to trespass upon complainant's leasehold premises. This privilege, however, is a privilege only, consequent upon complainant's having an interest in the land adjoining the water. It does not constitute a right *with* the meaning of the term "riparian or littoral rights" and complainant is not entitled to compensation if it is deprived of that privilege by operation of the fisheries statute. The statutes of both Oregon and Washington authorize various appliances for catching salmon, among others, set nets. They authorize the issuance of set net licenses, the necessary effect of which is to permit the *licenses* to locate a set net in some definite location. These statutes also prescribe a method by which the owner of premises available for drag seine operations may appropriate a location for that purpose in front of his land.

4. It is conceded by complainant's counsel that defendants complied with the statutes applicable to procuring set net licenses and locating appliances thereunder, except for the point (claimed by complainant) that such set nets cannot lawfully be placed so as to interfere with the drag seine fishery con-

ducted by complainant or to interfere with its access to deep water, and except for the further point that the buoys which the defendants anchored to mark the location of their set nets were not marked with the letter "O" and the number of an Oregon license, but carried only the number of the Washington licenses issued to defendants and the symbol required by the Washington statute. Complainant's contention in this regard is twofold: First, that complainant as a riparian or littoral owner is entitled to access at all times to the [155] waters in front of its leasehold premises and is entitled to prevent the placing of any structure or other appliance in those waters which will interfere to any extent whatever with such access, and secondly, that complainant has a right to prosecute the drag seine fishery which attaches to its leasehold as a necessary incident thereto, and that any interference with that right may be enjoined. So far as concerns riparian or littoral rights including the right of access, I hold that before an injunction should issue in favor of a shore owner against the maintenance of fishing appliances authorized by State statute below low-water mark and beyond the limit of private ownership, a real and substantial interference with the shore owner's right of access must be shown. Riparian or littoral rights cannot be used as a means for securing a monopoly of the rights of fishing in the common waters in front of premises bordering on a sea or river. Here it does not appear that defendant's set nets will do more than prevent the drawing of seines below low-water mark. Empty spaces several hundred feet wide are left between the

set nets and they interfere with nothing but complainant's proposed fishing operations in deep water. So far as concerns complainant's claim that any interference with its drag seine operations is an interference with its property rights, I am unable to sustain its contention. Defendants, having a State license to maintain and operate set nets, had a right to choose their location so as to appropriate a certain portion of the common fishery. If they chose a location where complainant intended to operate a drag seine, but for which location it had secured no right under the State law, it was complainant's misfortune. Under the statutes of both States, he who is first in time in securing a location is first in right, and the upland owner is given no **[156]** advantage as to priority over others. At the time this controversy arose and prior thereto ever since the separation of Oregon and Washington, it was supposed by almost everyone that Sand Island was in Washington. Defendants in selecting their location complied literally with the Washington law and complied substantially with the Oregon law. I think these facts (especially when considered in connection with the concurrent jurisdiction of both States on the Columbia River) give the defendants priority over complainant who had not complied or attempted to comply with the laws of either State. The restraining order issued in complainant's behalf in July, 1908, is still in force and has prevented defendants from continuing their possession of the location ever since. Under such a condition it must be presumed that but for the restraining order the defendants would have lawfully

continued to the present date the possession and rights which they had secured at that time.

5. I have had considerable difficulty in determining the question of fact as to whether defendants acted in good faith in locating the set nets in front of the leased premises. McGowan was an unsuccessful bidder for the leasehold rights. He had formerly conducted drag seine operations at the same place. A number of witnesses have testified that set nets cannot be successfully operated there. If it appeared that defendants located their set nets at that point for the sole purpose of harassing complainant and without any reasonable expectation of making a profit out of the fish to be caught therein, I would grant the injunction prayed for. The presumption, however, is in favor of good faith and the fishing business is one peculiarly subject to uncertainty. I am not [157] able to say from the evidence that it is established that defendants' location of the set nets was merely for the purpose of harassing or embarassing complainant. They had a right to choose their location and to make reasonable endeavors to catch fish, and the fact that set nets would catch fewer fish than a drag seine at this point cannot determine the controversy.

6. It follows that complainant's prayer for injunction must be refused, and the restraining order heretofore issued must be dissolved. There will be a reference to a master to ascertain the damages recoverable by defendants under the bond given on the restraining order. The measure of damages is one of the subjects discussed by the parties in their briefs.

I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they had been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage. There will be a reference to a master to ascertain and report the amount of damages. He will consider the evidence already taken so far as it bears upon this point and such other evidence as the parties may introduce within such time as may be allowed by the Court.

An interlocutory decree will be entered accordingly.

GEORGE DONWORTH,
Judge. [158]

Filed U. S. District Court, Western District of Washington. Jan. 24, 1912. A. W. Engle, Clerk. R. W. Jamieson, Deputy. [159]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1385.

(Circuit Court.)

COLUMBIA RIVERS PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel, C. W. Fulton and G. C. Fulton, Esquires, appearing for plaintiff, and Welsh & Welsh and Dorr and Hadley, appearing for defendants and cross-complainants (defendants Walter Bussey and I. N. Stensland having been heretofore dismissed from this suit by consent without costs), and thereupon, upon consideration thereof, it was adjudged and decreed as follows:

That the Columbia River Packers' Association, a corporation, plaintiff herein, shall take nothing by this suit, and that the temporary injunction and restraining order heretofore issued against the defendants upon the application of plaintiff, and entered herein, and the same is now and hereby dissolved and vacated; that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and

J. P. Coyle, were, at the time of the commencement of this suit and ever since have been, and now are, and until the expiration of the current fishing license year hereinafter referred to, will be entitled to the exclusive right to construct, maintain and operate the set nets and other appliances which they had constructed in the months of [160] June and July, 1908, on the fishing grounds hereinafter in this decree described and referred to, and to use the said nets and appliances for fishing; that plaintiff did not have, at the time of the institution of this suit, and has not, at any time since, had any right to interfere with said defendants and cross-complainants in their occupation and use of said nets and appliances, or with the locations therefor, described and referred to in the pleadings in this suit, and that plaintiff's interference therewith was without right, license or authority; that at all times since the commencement of this suit the defendants have had the right and now have the right to reconstruct and to maintain and operate for fishing purposes in said location set nets and appliances of the same kind and character and covering the same area as those which they constructed as aforesaid in the year 1908, that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and each of them, are awarded an injunction as hereinafter set forth against the plaintiff from this time henceforth until the end of the current fishing license year, which said license year will expire on the 31st day of March, 1912, under the provisions of the statutes of the State of Oregon; that the said defendants and cross-complainants, H.

S. McGowan, Erick Lindstrom and J. P. Coyle, also are entitled to personal judgments against the plaintiff and its surety on its injunction bonds (to wit: the United States Fidelity and Guaranty Company), for damages sustained by said defendants and cross-complainants because of their having been deprived by plaintiff of the use of said nets and appliances from the 7th day of July, 1908, the date upon which the said temporary injunction was issued until this date, not, however, exceeding the sum of twelve thousand dollars ($12,000) as against [161] the said surety, recovery against it being limited to that amount by its undertakings as surety on the two injunction bonds filed herein by and on behalf of said plaintiff.

AND IT IS THEREFORE ordered, adjudged and decreed that the plaintiff, the Columbia River Packers' Association, its officers, agents, attorneys, servants and employees, and all persons acting or claiming, or to claim by, through, or under said Columbia River Packers' Association, be and they are, from this time henceforth, until and during the 31st day of March, 1912, enjoined and restrained from interfering with the quiet and peaceable enjoyment by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and by those acting or claiming, or to claim by, through or under them, or either of them, of the right to construct, maintain and operate said set nets and appliances to the same extent and in the same location as said defendants occupied in June and July, 1908, and from interfering with the erection, location or main-

tenance by said defendants in the waters of the Columbia River below the line of ordinary low tide of such piles, buoys, or other things as may be necessary or proper for the purpose of enabling said defendants to comply with the laws of the State of Oregon relating to securing, holding or marking the same set net locations as they occupied in June and July, 1908.

Said fishing locations are situated in the Columbia River off the southerly side of Sand Island, below the line of ordinary low tide, and above, or to the northward of the Government's fairway or channel line, whereat fishing may be carried on with fixed appliances without special Government permits. Said fishing locations are further described as lying immediately to the southward below and in front of the low-tide line which [162] is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island, which said low-tide line is described in the amended bill in this suit as follows:

> "A line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to *to* the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south

line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked."

IT IS NOW FURTHER ORDERED, adjudged and decreed that the three defendants and cross-complainants, and all of them, do recover of plaintiff their costs, and disbursements in this suit to be taxed.

ALL OF WHICH IS FINALLY ADJUDGED AND DECREED.

IT IS FURTHER ordered and decreed that for the purpose of determining the amount of damages to be assessed against the plaintiff, this cause is hereby referred to Honorable M. A. Langhorne, a commissioner of this court, residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice*, to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of said nets and appliances from and after the seventh day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of this decree; and to that end, said Commissioner may consider the testimony heretofore taken in this cause, and may hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as aforesaid, as the parties, or either of them, may offer; that upon the conclusion of the [163] hearing, the said Commissioner shall report his findings and conclusions to this Court, together

with any further testimony which may have been taken before him.

IT IS FURTHER ordered that any additional testimony which may be desired on the part of said cross-complainants shall be taken within twenty days from the date of this decree, and the taking of any additional testimony which may be desired on the part of the plaintiff shall be taken within twenty days thereafter, unless the times are enlarged by stipulation of the parties, or by order of said Special Master.

To all of the above, and to every part thereof, the plaintiff, in open court, duly excepted, and the exceptions were duly allowed by the Court.

All done in open court this the 5th day of February, A. D. 1912.

GEORGE DONWORTH,
Judge.

Filed U. S. District Court, Western District of Washington. Feb. 5, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy. [164]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, and J. P. COYLE,
Defendants.

Report of Special Master, Including Findings of Fact and Conclusions of Law.

To the Honorable Edward E. Cushman, Judge of the Above-entitled Court:

The above cause having heretofore duly come on for hearing before the Honorable George Donworth, then one of the Judges of this court, upon the right of the plaintiff to enjoin the defendants in this cause from occupying their set net fishing locations described in the pleadings herein; and the Court having heard the evidence thereon and having on the 5th day of February, 1912, entered his interlocutory decree herein whereby the plaintiff's prayer for injunction was denied, and the temporary restraining order theretofore issued against the defendants was dissolved; the Court having in said decree provided that for the purpose of determining the amount of damages to be assessed against the plaintiff this cause should be referred to the undersigned, as Special Master to ascertain and report to the Court the amount of damages, if any, suffered by the defendants and **[165]** cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of set nets and appliances from and after the 7th day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of said interlocutory decree; and the Court having further provided in said decree that the said Commissioner should consider the testimony theretofore taken in this cause and should hear such other and further

testimony bearing upon the question of the amount of damages sustained and to be recovered, as aforesaid, as the parties, or either of them might offer, and said decree having further provided that said Commissioner should upon the conclusion of the hearing, report to this Court his findings and conclusions, together with any further testimony taken before him, as aforesaid; and the parties having heretofore, to wit: on the 23d, 24th and 25th days of April, 1912, taken further testimony before the undersigned, as Special Master, which has been fully transcribed and is herewith submitted and filed as a part of this report; the Special Master having heard and considered said testimony, as well as that previously taken before the Court, and having considered the said decree and also the opinion of the Court on file in this cause, and having heard the arguments of counsel and being now fully advised in the premises, makes the following

FINDINGS OF FACT.

1.

The long-established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location [166] during a given fishing season one-third of the gross catch of fish made at said location during the fishing season; when the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the loca-

tion, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch.

II.

Under the rule for fixing the rental value of fishing locations upon the Columbia River as set forth in finding of fact No. 1, it is impossible to determine the value without ascertaining the amount of the actual or probable catch of fish at a given location for a given season.

III.

The defendants and cross-complainants, up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911.

IV.

During the entire time of the four fishing seasons mentioned in finding of fact number three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines thereon for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows: **[167]**

In the year 1908, 150 tons.
In the year 1909, 104 tons.
In the year 1910, 135 tons.
In the year 1911, 390 tons.
Total for four years, 779 tons.

V.

The set nets which the defendants would have operated upon said fishing locations had they not been prevented by plaintiff from occupying the locations would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of 779 tons, the amount shown by finding of fact number four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons.

VI.

I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them, but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons.

VII.

As set forth in finding of fact No. 6, the amount of fish to which defendants were entitled as the [168] rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of the fish for the four seasons was $130.00 per ton, and the 172

tons of fish were of the value of $22,360.

VIII.

The defendants and cross-complainants were equally interested in the said fishing locations.

From the foregoing Findings of Fact, I make the following

CONCLUSIONS OF LAW.

I.

The value of 172 tons of fish was the aggregate rental of defendants' fishing locations for the four fishing seasons, and that value is the measure of defendants' damages in the aggregate. The value, as set forth in the Findings of Fact being $22,360, the defendants are entitled to recover that amount in the aggregate.

II.

The three defendants and cross-complainants, namely, H. S. McGowan, Erick Lindstrom and J. P. Coyle, are equally interested in the damages and should have a judgment accordingly.

MAURICE LANGHORNE,
Special Master.

[Endorsed]: Filed U. S. District Court, Western District of Washington. May 13, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[169]**

In the District Court of the United States for the Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Exceptions to Report of Special Master.

Comes now the above-named plaintiff and files herein its exceptions and objections to the report, findings of fact and conclusions of law made and filed herein by the Special Master heretofore appointed by the above-entitled court.

I.

The plaintiff excepts to finding of fact No. I, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

II.

Plaintiff also excepts to finding of fact No. II, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evi-

dence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. **[170]**

III.

Plaintiff also excepts to finding of fact No. III, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

IV.

Plaintiff also excepts to finding of fact No. IV, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

V.

Plaintiff also excepts to finding of fact No. V, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

VI.

Plaintiff also excepts to finding of fact No. VI, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. **[171]**

VII.

Plaintiff also excepts to finding of fact No. VII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

VIII.

Plaintiff also excepts to finding of fact No. VIII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

IX.

Plaintiff excepts to conclusion of law No. I, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence,

and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

X.

Plaintiff excepts to conclusion of law No. II, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

G. C. FULTON,
Attorney for Plaintiff. [172]

State of Oregon,
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say: That on May 17, 1913, I served the within and foregoing exceptions to the report of the Master filed herein in the above-entitled suit upon Messrs. Dorr & Hadley, attorneys for defendants, by depositing a copy thereof in the United States postoffice at Astoria, Oregon, enclosed in a sealed envelope, with postage prepaid, addressed to Messrs. Dorr & Hadley, Attorneys at Law, Coleman Building, Seattle, Washington; and I also served a copy of said exceptions upon Messrs. Welsh & Welsh, attorneys for defendants, by depositing a copy of the foregoing exceptions in the United States postoffice at Astoria, Oregon, in a sealed envelope, with postage prepaid, addressed to Messrs. Welsh & Welsh, Attorneys at Law, South Bend, Washington, all on the said 17th day of May, A. D. 1913, said addresses of

said attorneys aforesaid being their regular post-office addresses and places of abode.

G. C. FULTON.

Subscribed and sworn to before me this 17th day of May, A. D. 1913.

[Seal] A. A. ANDERSON,
Notary Public for Oregon.

Filed U. S. District Court, Western District of Washington. May 19, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[173]**

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Motion for Confirmation of Findings and Conclusions of Special Master, and also for Final Judgment and Decree.

Come now H. S. McGowan, Erick Lindstrom, and J. P. Coyle, defendants in the above-entitled cause, by Welsh & Welsh and Dorr & Hadley, their attorneys, and move the Court to approve and confirm the report, findings of fact, and conclusions of law

returned by Hon. M. A. Langhorne, Special Master herein, which report, including said findings and conclusions, is now on file with the records of this cause; and said defendants also move the Court for the entry of final judgment and decree in this action in accordance with said findings of fact and conclusions of law.

WELSH & WELSH, and
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: Service of the within motion is accepted and receipt of copy admitted this 19th day of May, 1913.

G. C. FULTON,
Attorney for Plaintiff.

Filed U. S. District Court, Western District of Washington. May 22, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[174]**

[Opinion on Report of Master.]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 1358.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Complainant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Filed, August 12, 1913.

C. W. & G. C. FULTON, for Complainant.

WELSH & WELSH,

DORR & HADLEY, for Defendants.

CUSHMAN, District Judge.

Complainant, as the lessee of certain fishing sites on Sand Island, in the Columbia River, sues to enjoin the defendants from constructing and maintaining, in the waters of said river, below low-water mark, certain fishing appliances, known as "set nets," placed there by the defendants. Upon a former hearing, it was held that the plaintiff was not entitled to such injunction, and, upon the cross-complaints of defendants, it was held that they were entitled to an injunction against the plaintiff, and that they should recover their damages against the plaintiff and its bondsmen, for which purpose the cause was referred to a Special Master.

In the opinion rendered upon the merits, the Court said: [175]

> "I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they have been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the

circumstances affecting the net rental value, it would not, in itself, be the measure of damage."

Upon the special reference, the Master found:

"The long established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season. When the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch."

The Master based the recovery allowed the defendants upon this finding—allowing them one-third of what he found to be the value of their *probable in* 1908, 1909, 1910 and 1911. The cause is now for determination upon plaintiff's exceptions to the Master's report, the chief exception urged being to the foregoing finding, it being contended that the same was contrary to the decision of this Court, as above quoted.

Upon the hearing of the exceptions, the original controversy was argued to considerable extent, but it is held that all questions in the main controversy have been concluded, so far as this Court is concerned, by the decision already rendered. The only matter properly before the Court upon the exceptions

being the question concerning the amount of damages to be awarded and the measure, or rules to be applied in ascertaining such damage. [176]

The complainant excepts to the recovery by the defendants and cross-complainants of anything for the year 1911. This question was fully considered and covered by the interlocutory decree. Plaintiff further excepts to the Master's finding concerning the year 1911, because of the fact that, at the time the suit was instituted, plaintiff occupied Sites Nos. 2 & 3 on Sand Island; the controversy arose over defendants' locations immediately in front of these sites; that, as in the year 1911, plaintiff had leased from the Government an additional site (No. 1), and that its catch of three hundred ninety tons of fish for that year included the fish caught by it in front of Site No. 1, in which defendants would have no interest and which would not be included in the issues in the suit. The question of the number of fish, if any, caught by the plaintiff in front of Site No. 1, in 1911, was gone into upon the evidence and the Court finds the Master's finding concerning that year supported by the preponderance of the evidence.

The Master found that defendants' nets, if their operation had not been prevented by plaintiff, would have taken two-thirds as many fish as were, in fact, caught by plaintiff in its seines. From the testimony offered by the plaintiff, the Master found that it caught, during the years 1908, to and including, 1911, seven hundred seventy-nine tons of fish, two-thirds of which, or five hundred eighteen tons would have been caught by defendants. The Master further

found that the customary rental for fishing locations on the Columbia River, where the lessee furnished all the fishing gear, was one-third of the total catch of fish, which in the present case, for the years involved, would amount to one hundred seventy-two tons of fish, at an [177] average price, for the years mentioned, of One Hundred Thirty Dollars per ton, making a total value for the years mentioned of Twenty-two Thousand Three Hundred Sixty Dollars.

The Court rejected the claim that the total profit of the fishing operations—to which was necessary, not only the site, itself, but the expenditure of money, the labor of men, attention of the lessee and the necessary equipment for such operations—would be the proper measure of damage for loss of the location. Such a method was, as the Court held, too conjectural—necessarily so, because of the uncertainty in calculating the amount of the net profits to be credited to that portion of the investment and work not represented by the location, itself.

This is the sense in which the words used in the former decision were used, rather than in the sense that any method which took into account the probable catch as a basis for computing the rent, was too uncertain and speculative a basis from which to determine the rental value. No effect can be given the following words, found in the decision, by any other construction:

> "While the probable catch of fish by means of set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage."

Thus it was determined that evidence of the probable catch was admissible for the purpose sought, not to allow the total cost as rental, nor all the profits from the catch, but as a quantity from which to calculate the rental value.

In the Pacific Steam Whaling Co. vs. Alaska Packers' Assn., 72 Pacific, pp. 161 to 165, in considering what damages should be recovered *when has* been wrongfully deprived of a fishing location, where in fixing the probable catch of the plaintiff, the actual catch of the defendant [178] was shown, the Court said:

> "But a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar." (At p. 163.)

Exception is also taken to the insufficiency of the evidence to establish what the plaintiff terms "a custom on the Columbia River, or Lower Columbia River to allow as rental one-third of the catch where the lessee furnishes everything except the site." It is not clear that the Master used the word "custom" in his finding in the restricted sense, which the plaintiff in its argument seeks to have put upon it. Little, if anything, is shown by the evidence to establish that set net locations had been rented in the lower Columbia River for a rental of one-third of the catch, but it was amply shown that fishing locations on the

Columbia River, generally, were frequently so rented.

Where the matter for consideration concerns a contract, or the action of individuals voluntarily taken with relation to one another, it might be held that the evidence of custom in this case was too meager to justify the conclusion that the parties contracting, or acting, presumably took into account such custom for, in such case, the one invoking the custom would, of necessity, have to show that it was acted upon with such frequency, and was so prevalent as to import knowledge on the part of the parties acting; but the reason for such rule does not apply to this case, for the defendants were not contracting with the plaintiff, or acting in any way in relation to such custom. Plaintiff simply took from them, **[179]** against their will their fishing site. The Master's finding is simply to the effect that fishing sites on the Columbia River were ordinarily rented for one-third of the total catch, where the lessee furnished all of the gear.

In the interlocutory decree it was held that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, were entitled to personal judgments against the plaintiff and its bondsmen. The Master found that the defendants were equally interested in the fishing locations. They will, therefore, have separate judgments, each for one-third the total amount of recovery and each for one-third of the total costs incurred,—each of such judgments to be limited to Four Thousand Dollars, as against the bondsmen, which, taken together,

will make Twelve Thousand Dollars, the face of the bond.

By finding No. VII, the Master found that the average price for fish for the four seasons (1908, 1909, 1910, and 1911) was One Hundred Thirty Dollars per ton, and calculated defendants' damages accordingly. In this finding, it is concluded, that the Master was in error, and that the testimony of the witness McGowan—that One Hundred Thirty Dollars was the average price for fish—although not entirely clear, was intended by the witness to apply to the year 1911. The testimony shows that the average price of fish for 1910 was One Hundred Thirty Dollars; 1909, One Hundred Twenty-five Dollars, and 1908, One Hundred Twenty Dollars. This would affect the first conclusion of law, making the value of the one hundred seventy-two tons of fish Twenty-two Thousand Eighty-three Dollars, instead of Twenty-two Thousand Three Hundred Sixty Dollars, as found by the Master. **[180]**

The report of the Master is, in all other respects, approved and confirmed.

Filed U. S. District Court, Western District of Washington, Southern Division. Aug. 12, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[181]**

In the District Court of the United States for the District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Complainant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Final Decree and Judgment.

Now, on this 22d day of September, A. D. 1913, this cause came on for hearing on the motion of the defendants for the entry of a final decree and judgment herein, the complainant being represented by G. C. Fulton, its attorney, and the defendants being represented by Welsh & Welsh and Dorr & Hadley, their attorneys; and it appearing to the Court that heretofore, to wit, on the 5th day of February, A. D. 1912, an interlocutory decree was entered herein wherein and whereby, among other things, it was ordered and decreed that, for the purpose of determining the amount of damages to be assessed against the complainant in this action, the cause was referred to the Hon. M. A. Langhorne, a Commissioner of this court residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice* to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan,

Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of the set nets and appliances in said interlocutory decree mentioned from [182] and after the 7th day of July, 1908, the date upon which the temporary injunction was issued against the defendants in this cause, up to and until the date of said decree; and to that end, the said Commissioner should consider the testimony theretofore taken in the cause, and should hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as the parties, or either of them, should offer; and upon the conclusion of the hearing, the said commissioner should report his findings and conclusions to this Court, together with any further testimony which may have been taken before him; and it further appearing from the report of M. A. Langhorne, the Special Master appointed in said interlocutory decree, which report is on file herein, that, in pursuance of the terms of said interlocutory decree, he did, on the 23d, 24th and 25th days of April, 1912, proceed to hear testimony upon the subject of damages as in said interlocutory decree directed, and that he heard such testimony as the respective parties desired to submit after which he duly examined the evidence which had theretofore been taken in this cause, pertaining to the subject of damages, and also the evidence which was taken directly before him as Master, and thereafter filed herein his findings of fact and conclusions of law, wherein and whereby it was found that the aggregate damages suffered by the defendants in this action was the sum of $22,360.00, and that

the three defendants are equally interested therein, for which they should have judgment; and it further appearing to the Court that thereafter, to wit: on the 2d day of June, 1912, this cause came on for further hearing before the Court on the motion of defendants for the confirmation of the findings of fact and conclusions of law, as returned by the Special Master, and also [183] upon the exceptions of the plaintiff to said findings of fact and conclusions of law, and that the Court, having heard the arguments of counsel, and having taken the matter under advisement, thereafter duly examined all the evidence pertaining to the subject of damages which *has* taken at the first trial of this cause, and also all the evidence which was taken before the Special Master and transcribed and returned with his report, and that, after having considered all of said evidence and the law in the premises, and being duly advised, the Court did, on the 12th day of August, 1913, file herein its memorandum decision wherein and whereby it did, in all respects, approve the findings of fact and conclusions of law as returned by the Special Master, with the exception that the Court found that the damages amount to $22,083.00 instead of $22,360.00, as found by the Master; and it further appearing to the Court that, by the terms of said memorandum decision, it was found that the defendants are equally interested in the amount recovered herein, and it was directed that separate judgments shall be entered herein in favor of each of the defendants for one-third of the total amount of recovery to wit: one-third of $22,083.00, and for one-third of the total costs incurred by the

defendants, and that said judgments shall also be entered against the United States Fidelity and Guaranty Company, the surety upon the injunction bonds given by the *complaint* in this cause, each judgment against said surety, however, to be limited to the sum of $4,000.00; and the cause now coming on regularly for further hearing upon the motion of defendants for judgment in accordance with the memorandum decision aforesaid, the Court being fully advised in the premises,

IT IS THEREFORE now CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, H. S. McGowan, shall recover in this [184] action of and from the complainant, the Columbia River Packers' Association, the sum of $7,361.00, together with the sum of $316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said H. S. McGowan shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of $4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of $4,000.00 and no more, but that the complainant, the Columbia River Packers' Association is liable for the whole of said sum of $7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, Erick Lindstrom, shall recover in this action of and from the complainant, the Columbia River Packers' Association, the sum of $7,361.00, together with the sum of $316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said Erick Lindstrom shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of $4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability *if* said surety and of the complainant is coequal to the extent of $4,000.00 and no more, but that the complainant, the Columbia River Packers' Association, is liable for the whole of said sum of $7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of [185] this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, J. P. Coyle, shall recover in this action of and from the complainant, the Columbia River Packers' Association the sum of $7,361.00 together with the sum of $361.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said J. P. Coyle shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of $4,000.00, which amount is included in the above

sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of $4,000.00 and no more, but that the complainant, the Columbia River Packers' Association, is liable for the whole of said sum of $7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor. Special Masters' fees fixed at $250.00 dollars—

ALL OF WHICH IS FINALLY ADJUDGED AND DECREED.

To all of the above and every part thereof, complainant in open court duly excepted, and the exceptions were duly allowed by the Court.

ALL DONE in open court this 22d day of September A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

Filed U. S. District Court, Western District of Washington, Southern Division. Sep. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [186]

In the District Court of the United States for Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,
Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,
Defendants.

Engrossed Testimony and Evidence.

BE IT REMEMBERED, that after the above-entitled cause was fully at issue by an order of the Court duly rendered and entered on the 29th day of August, 1910, the said cause was referred to C. D. Savery, Special Examiner, to take the testimony and evidence offered and introduced by the respective parties, and when concluded to report the same to the Court for such further proceedings as the Court should determine. At the taking of the testimony and evidence G. C. Fulton, Esq., appeared for the plaintiff and Messrs. Dorr & Hadley and Messrs. Welch & Welch, appeared for the defendants.

Thereupon the following testimony and evidence was duly taken before said Special Examiner and by him duly returned and reported to the Court, that is to say:

The plaintiff, in order to sustain the issues on its part produced the following testimony and evidence:

The plaintiff by his attorney offered in evidence a certified copy of the records of the Department of the Interior relative to the proclamation of the President of the United States reserving Sand Island as a military reservation. [187]

To the introduction of this document in evidence the defendants, by their attorneys, objected upon the ground that it was immaterial and irrelevant.

Thereupon said document was received and marked as Plaintiff's Exhibit "A," and the same is hereunto attached so marked and made a part hereof.

Plaintiff, by its attorney, then offered in evidence

a certified copy of the articles of incorporation of the plaintiff under the laws of the State of Oregon.

Thereupon said document was received in evidence and marked as Plaintiff's Exhibit "B," and the same is hereunto attached so marked and made a part hereof.

The plaintiff, by its attorney, then offered in evidence a certified copy of the articles of incorporation of the plaintiff as filed with the Secretary of State of the State of Washington, and also a certificate of such Secretary as to the filing thereof.

Thereupon said documents were received in evidence and marked as Plaintiff's Exhibits "C" and "D," respectively, and the same are hereunto attached so marked and made a part hereof.

Plaintiff then offered in evidence a lease from the War Department signed by the Secretary of War to the plaintiff for Sites 2 and 3 on Sand Island. [188]

Thereupon said document was received in evidence and marked Plaintiff's Exhibit "E," and the same is hereunto attached so marked and made a part hereof.

To the introduction of said lease the defendants, through their attorneys, objected, for the reason that the offered evidence is incompetent, irrelevant and immaterial, and that the lease does not purport to cover any fishing rights, littoral rights, riparian rights, or any interest or right whatsoever, or to vest the lessee with any such interest or right outside of the territorial limits of the grounds or land proper. And further, for the reason that it would be impos-

sible under the law for the War Department of the United States to grant, convey or lease to these defendants, or anyone else, any fishing rights, littoral rights or riparian rights of the shore line of the premises leased by this instrument. And further, for the reason that the offered lease does not purport to cover Sand Island, or any part thereof, which is referred to in the preceding paragraph of this action. It is admitted, however, that the instrument is executed by the officers which it is purported to be executed by, and that they are the officers of the Government as represented, and that the signature purported to be the plaintiff's signature is its signature.

[Testimony of R. A. Hawkins, for Plaintiff.]

R. A. HAWKINS was then called as a witness on behalf of the plaintiff, who, after being sworn according to law, testified as follows:

I reside at Ilwaco in the State of Washington, and have resided there for about thirty years. I am forty-four years of age the twentieth of this month, and am engaged in the fishing business, trapping, seining, etc. I am superintending that kind of work at Ilwaco on both the Oregon and Washington waters in the [189] Columbia River, and I have been interested in the catching of salmon and fish by traps, seines, set nets, etc., for about twenty years, and am familiar with the manner in which such fish are taken in the West on the Columbia River, and have been during such times, and I have been engaged in such business myself, both trapping,

(Testimony of R. A. Hawkins.)

set net fishing and seines. A seine is ordinarily described as a drag net. At present I am in the employ of the plaintiff, the Columbia River Packers' Association, and have been in its employ ever since it was incorporated, and it was incorporated, as I understand, in 1899, on the fifth day of January. The nature of my employment is that of superintendent of fisheries of the plaintiff. The character of the fisheries operated by the plaintiff and in which it has been interested during such times is seining and trapping, and I have superintended from twenty-five to thirty traps each year, and from three to six different seining grounds. I have no seining grounds myself, but I own traps. I am acquainted with Sand Island at the mouth of the Columbia River and have been acquainted with it for about thirty years. That there is and has been during that time only one island at or near the mouth of such river and it has always been called or named Sand Island, and I know of no other island in the river bearing such name. I could not tell its acreage. I should say at the present time it is about three miles long and about one and a half or two miles wide. It is considerably larger than it was when I first knew it. It has moved and the sand has washed up and accumulated on all sides and it has grown in length and width. I do not think the main body has moved since I became acquainted with it. I think it has just merely added on. The witness was then handed Plaintiff's Exhibit "A," hereunto attached, and he stated that the island is much larger now than it was then, but

(Testimony of R. A. Hawkins.)

that it is the same island that is involved in this suit; that the island has moved further north and is more extensive. That formerly the main channel of the Columbia River was north of such island, [190] and when I first came here all of the ships came in on the north side of the island, and since that time the channel has changed to the south side. I am acquainted with Sites numbered 2 and 3 mentioned in Plaintiff's Exhibit "E," as indicated by the map attached thereto; that the map delineated thereon is the map of Sand Island, and that the Sites numbered 2 and 3 on such map are the seining grounds covered by the lease from the United States to the plaintiff. I have been acquainted with these sites since they have been laid out and for some time prior thereto. I used to operate Site numbered 3 for fishing purposes exclusively and for seining purposes in the operation of the drag seines, and I have so operated said sites ever since the Columbia River Packers' Association incorporated until such sites were leased by the Government and the Government then took possession. That Sand Island has been used for fishing purposes as long as I can remember, at least twenty years for seining, and has been used for seining purposes only. An attempt was made to drive fish traps on the west end, but they were taken out by the gill netters and there was no obstruction on the shore that I can remember of. I do not ever remember of any set nets being placed there until Mr. McGowan and others attempted to put them in. I refer to the defendants in this suit and

(Testimony of R. A. Hawkins.)

at the time complained of in this suit. Before that time I never saw or heard of any set nets being operated there or attempted to be operated. That the south shore of said island has been used for the last twenty years exclusively as seining grounds and for no other purpose excepting gill nets bothering the operations of seining considerably. They would fish in the same grounds or waters, but not on the shore. The shores of Sand Island on the south have been used exclusively for the last twenty years for the hauling of seines and the use of seines. The Government took charge about six years ago this coming spring. Before Sites 2 and 3 mentioned in Plaintiff's Exhibit "E" was leased to the Columbia River Packers' Association [191] the defendant, H. S. McGowan, had Site No. 2 and Jack Service had Site No. 3 and I think the Stensland boys had taken out the bids in their name. It was operated by drag seines. I know how these leases were obtained from the Government. The two sites were advertised and private bids were put in therefor. Such advertisements were made by the Secretary of War.

Q. Did you know the bidder for Sites numbered 2 and 3 at the time the bid was let to the plaintiff?

To this question the defendants, by their attorneys, objected on the ground that it was immaterial and not the best evidence.

A. Yes, sir. For 2 and 3 it was the Columbia River Packers' Association, Hansen & Olsen, or it may have been in the name of Chris Hansen and

(Testimony of R. A. Hawkins.)

Jack Service, and I don't know who else. Defendant Henry S. McGowan was a bidder for Sites numbered 2 and 3 at the time the premises were leased to the plaintiff. The Government in its lease generally included about 3,500 feet of the waterfront.

The soil on Sand Island is practically all sand in which grows a wild grass and a few little trees in the middle of the island. I know that the Columbia River Packers' Association paid the rental for the premises as set forth in its lease. I am acquainted with the value of seining grounds on the Columbia River and Sand Island.

Q. What is the value of the premises described as Sites 2 and 3 in this lease, Plaintiff's Exhibit "E"?

[192]

A. I would judge somewhere about $2,500 per year.

Q. Where is the boundary line between the State of Washington and the State of Oregon as established by the decision of the Supreme Court of the United States in the case of the State of Washington vs. the State of Oregon?

To this question counsel for defendant objected on the ground that it was incompetent testimony and that the Supreme Court itself says that it does not know where it is and the witness could not be presumed to know.

A. On the north side of Sand Island.

Prior to the beginning of fishing operations in the year 1908 the plaintiff, Columbia River Packers' Association, made all necessary arrangements for the

(Testimony of R. A. Hawkins.)

purpose of conducting and operating Sites 2 and 3. We bought seines and boats and employed a larger number of men and by the time fishing operations were begun there the plaintiff had expended fully $15,000. It had six seines and boats, two launches,, twenty-four horses and employed forty-eight men and had considerable paraphernalia. Fishing operations that year were begun on the second day of July. About the fifteenth day of June, 1911, we discovered that the defendants had placed in the waters in front of said sites immediately below the line of low water, a number of obstructions. The defendants had put in some nine buoys to which were attached wire cables and at the other end anchors, weighing all the way from 300 to a thousand pounds. The buoys were made of cedar bolts and they were probably 250 feet apart and occupied practically the entire front of Sites 2 and 3. These anchors were on the bed of the river and those on the inside you could wade out to at low water. These buoys and anchors were placed only in front of these two sites, and it was impossible [193] to operate the seines with these anchors and buoys in front of said sites or employ such sites for the purpose of operating seines thereon, and such sites are practically valueless for any other purpose. The seines are operated at that point in the following manner: You load your seines on the boats and have your launch pull it out probably 250 or 300 fathoms right out into the river, and you have four horses on the tail line and they pull that down for half a mile, prob-

(Testimony of R. A. Hawkins.)

ably, or three-quarters of a mile, and the boat brings in the head line and then they hitch the horse on and they pull it in. They take a scope of sometimes a mile. That the seines used by the plaintiff on these two sites were from 250 fathoms to 300 fathoms in length. The seines were operated generally on the ebb tide or first of the ebb and the first of the flood. Of course the tide floats these seines and they sweep the entire front and are hauled in on shore and the fish taken therefrom on or near the shore. With these obstructions that the defendants had placed in front of these premises it was impossible to operate seines. When I first saw these buoys there was nothing attached to them. I saw them about the fifteenth or twentieth of June for the first time. The next time I saw them was about two days after that, about the eighteenth. There was attached to two of these buoys a little piece of net in front of Site No. 3. I should judge it was made of seining webb about five-inch mesh. It was about 50 feet long, I would think. It was not possible to catch any fish with such a net. Regular gill net webb is necessary in order to operate a set net with a mesh of about nine or nine and a half inch and made of flax or linen twine. The net attached to these buoys that I speak of was made out of seining net. It was cotton. Fish can only be caught in a set net by gilling them, and it is impossible to gill fish in a seine or cotton webb. There was at this time a piece of gill net attached to the buoy [194] on No. 2 ground. I should judge it was about 50 to 150 feet long. It was tied on at one end only and lay

(Testimony of R. A. Hawkins.)
up and down stream. In such position it was impossible to catch fish. I am familiar with the manner in which set nets are operated. They are generally put in and tied at both ends across a stream where there is not a very strong current, as a rule, where the fish are corralled and gilled therein. When the plaintiff was ready to begin operations I received orders from the plaintiff to remove these buoys and anchors and obstructions, and they were accordingly taken out in front of said premises and placed on shore. The next day we found three or four of similar character replaced in front of the premises about the same way the others were. The main channel of the Columbia River washes the south shore of Sand Island and in operating seines on the shore of such island the main portion of the river is fished. Of course we do not get out in the middle of the channel. The reasonable cost of operating plaintiff's seining outfit at that time was close to $200 a day. Up to November, 1908, when the Supreme Court of the United States determined the boundary line between Oregon and Washington to be north of Sand Island, the general understanding was that Sand Island was in the State of Washington. We were notified by our Fish Commissioner in Washington to purchase licenses in the State of Washington, and we always took our licenses out in the State of Washington prior to that time. After that we were notified by the Fish Commissioner of Oregon to take out our licenses in Oregon. I know what the general belief and opinion was in the State of Washington as to

(Testimony of R. A. Hawkins.)

what State Sand Island was located in, and it was the general belief and opinion that it was in the State of Washington, and this claim was made by practically all the officials in the State of Washington. I never heard anyone claim that it was in Oregon, and I never knew of the officials [195] of Oregon claiming that Sand Island was in Oregon prior to that decision. I recognize these licenses that have been handed to me and they are the licenses that the plaintiff operated under during the year 1908.

Whereupon the said licenses are offered in evidence by counsel for the plaintiff, not because we admit that the State of Washington had any authority to issue such licenses, but for the purpose of showing that the State of Washington and its officials claimed and exercised the jurisdiction over Sand Island and claimed it to be within the territory of Washington at the institution of this suit, and also to uphold the allegations of plaintiff's complaint. These licenses were numbered 2391, 2392, 2393 and 2394, dated June 30, 1908, and the same were received in evidence and all are marked Plaintiff's Exhibit "F" and are hereunto attached so marked and made a part hereof.

Upon beginning fishing operations for the year 1908 it was necessary to clear the grounds, which was done at an expense of something like $700.

Counsel for plaintiff then offered in evidence a map prepared by the United States Geodetic Survey of the Columbia River, Sheet No. 1, entrance to Astoria.

(Testimony of R. A. Hawkins.)

This document was received in evidence and marked Plaintiff's Exhibit "G," and the same is hereunto attached and so marked and made a part hereof.

The land marked "Sand Island" represents the land in controversy in this suit, and on the south shore of that island are Sites 2 and 3. In my judgment this is a correct map of the river and Sand Island.

Q. And the boundary between the State of Oregon and the State of Washington is north of Sand Island and between that and the shore of the Columbia River. [196]

To this question counsel for the defendants objected on the ground that it was incompetent.

A. Yes, sir.

Cross-examination.

I have lived in Ilwaco for thirty years past continuously, and have been familiar with the general surroundings there all that time and have been engaged in the fishing business for twenty years, and have been employed by the plaintiff since the year 1899. I was engaged in the fishing business with Mr. Elmore prior thereto and I fished in the vicinity of Sand Island all that time more or less. Sand Island has been growing in four directions—north, south, east and west, and growing larger all the time, and it is somewhere around in the neighborhood of the same relative position that it was thirty years ago. It has moved, I suppose, a little. I could not say exactly how much; sometimes it would wash off, sometimes it would wash on. It has never dis-

(Testimony of R. A. Hawkins.)

appeared entirely. I cannot say how many miles it is now from its original location. It was a little place when it first came and it has been growing to the extent of probably a mile and a half. Of course I do not think it is two or three miles from its original location. I do not think more than one mile. It is somewhere about half a mile that has accumulated on both sides, probably a half a mile and maybe a little more. I think that part of the present island covers the same space that the old island covered, and I am sure of that. I have never surveyed it or anything like that, but I have been on it every day more or less, year in and year out, and my answer is not based on any definite measure, only by my experience on the island. I said formerly the channel was on the north side of the island and now the channel is on the south [197] side of the island. It changed a good many years ago. The tugs and ships have been going on the south side and when I first came there all the ships and tugs went up on the north side. They lay under Cape Disappointment. I think the channel changed about something over twenty years ago and the north channel practically disappeared. It is pretty shoal. It does not go dry at low tide. It is different depths at different places. In the deepest place, which is in Baker's Bay, there is probably about ten or twelve feet of water. Along in the vicinity of the island are two or three spots which they call the "North Channel" now which it would be pretty hard to get the fish boats through at extreme low tide, but at ordinary tide you can get

(Testimony of R. A. Hawkins.)

through there with your launch. I never saw it where I could see the dry land. Of course you can see little spots of sand the other side of the channel.

I cannot give in detail the amount of money that the Columbia River Packers' Association expended in making preparations for fishing there in 1908. Approximately I would say six seines were bought that year, gasoline launches and scows. We did not purchase any horses as we had some and rented some. The Columbia River Packers' Association had not been seining on those sites the year before but had been seining on Desdemona Sands, about four or five miles up river from Sand Island and entirely separate from Sand Island but of the same general character. When I first went over to Sand Island and saw these buoys I could not tell whether they had a State license printed on them or not. They had a number on them. I took the number off and wrote to the Fish Commissioner of the State of Washington and found that these licenses belonged to the defendants and when we got ready to seine we took them out. We just pulled them out and then the defendants replaced them. Then we took them out again. We took them out twice; just pulled them out and removed them. I gave instructions to our employees to take them out. The buoys were all below the **[198]** line of low tide in water from three to ten feet deep. I never saw Mr. McGowan up there. I think the first time we took out these buoys and anchors was some time about the last of June. Mr. McGowan fished Site No. 2 the

(Testimony of R. A. Hawkins.)

previous year. He had the lease for three years. I think that lease was taken out in the name of Mr. Stensland. I don't know whether in his name, but Mr. McGowan was considered the main man who was running them. Prior to that I think Mr. McGowan had a ground over there but I think it took in a part of No. 2 and some of No. 3, and he was operating a seine there *was as* also the Columbia River Packers' Association, although we had different grounds. We had No. 3 and part of No. 2. Mr. McGowan had no set nets out there prior to 1908 and I never knew of anyone else having any there. When I spoke of cleaning the grounds for fishing I mean that it was cleared of the old snags, roots and different things like that. Then there was once upon a time several years ago a party started to operate a fish trap at the lower end, and these piling were broken off and taken out by the gill netters and the same had washed away and the tops taken out and we had to hire a donkey and scow to pull these out in order to pull up our seines.

As soon as we obtained the lease we went right to work and ordered the seines and boats built and acquired everything necessary to operate seines on these grounds. We did not purchase any horses; we had some and rented others. I could not tell whether the buoys and obstructions in front of the island contained the number of the State license but I took the numbers that were painted on the buoys and wrote to the Fish Commissioner of the State of Washington and found that they were owned by the

(Testimony of R. A. Hawkins.)
defendants. I understood these numbers painted on these buoys were intended as license numbers. When we got ready to seine we simply removed all of these buoys; pulled them out; placed them on the island. We were unable to seine unless they were removed. **[199]** I know the Columbia River Packers' Association paid the rental named in the lease, but I did not see the check signed. We began actual seining on the ground the second day of July.

A set net is made out of eight or nine and a half inch mesh hung on a cork line and lead line and as a rule set in a place where there is no current to amount to much and where the space is confined so that the fish cannot go past. Where they do most of the set netting is where they can put the net from shore to shore and block up the stream and confine the fish below. That is generally the way they set nets. I have never run or operated a net myself on the Columbia River. I had a few set nets over on Willapa Bay, not to amount to much, but have seen a great many operated. The way they are usually held is by driving a big stake on shore and a post on the other shore and stretching the net across the stream. I never saw anyone anchor them in the river and it is not a common practice to do so. I never saw a set net anchored, I mean without driving piles. I do not think it is practical to hold a set net by anchors, that is where there is any tide this cannot be done. You might hold them, but the lead will not. It will float to the top of the water. You cannot fish set nets by anchors. You cannot hold

(Testimony of R. A. Hawkins.)

them. At this particular location there is slack tide at times. The tide rises and falls from five to nine feet daily. The distance between the line of high-water mark to the line of low-water mark on these sites varies, but it averages from 75 to 100 feet. In some places the bed drops off more rapidly than other places. Ordinarily, it is a gradual slope to the channel. The channel there is quite wide and the vessels run pretty close to Sand Island. The last time I measured from Sand Island I measured out 300 fathoms from the shore and the water was from seven to eight fathoms in depth. The principal fish caught at Sand Island is Chinook salmon, blue-backs and silversides. All **[200]** salmon fish of different varieties and we have different mesh for different kinds of fish. For seines we use from a four inch mesh to say within about five. Some might use a little larger, five and one-fourth. The seine is intended to take all fish that get in its way. Fish caught in set nets are gilled and the mesh must be of considerable size to get their heads in. About nine and a half inch mesh is the common size mesh used in gill nets and set nets. They sometimes fish for the smaller fish such as bluebacks and steelheads with six and a half inch mesh, but very few of these are used. A gill net is described as containing mesh between eight and nine inches accordingly as you wish it. And after you have knit it selvage it with cotton twine, both on the lead line and the cork line, then after it is selvaged you hang the cork line with floats, probably two and a half feet apart; the lead line you

(Testimony of R. A. Hawkins.)

hang with leads probably nine to eleven inches apart. It is operated by taking it out into the river and it is then thrown out of the boat. They average from 250 to 300 fathoms long and about 45 meshes deep and fish are caught therein by the gills. There is considerable difference between fishing a gill net and a set net. Where you have a set net across the stream where you can control the stream, you can fish, but you cannot if it is anchored in a body of water. The fish will come up to the gill net if it is short set, and they will probably leave, and if the net is anchored at the top and a cork line at both ends, and the current is strong it will raise the lead line and the fish will go under it. When you are coming down with the current the gill net stays down and the fish are forced to gill that way. I would not consider that the method of catching fish with a gill net and a set net are the same. There is no set nets practiced on the lower Columbia, down as far as the river at all. None of it has ever been done there. **[201]** A set net and a gill net are made out of the same material and the same mesh, but they are operated differently. A set net is stationary, while the gill net floats with the current. And the cork line and the lead line in the gill net come down at the same time with the tide. I should judge that Sites Nos. 2 and 3 for fishing purposes were of the approximate value of $5,000 per year. I do not know exactly how much fish we caught in 1908, somewhere around 100 tons. I could not say how many fish were caught on Site No. 2. We fished from the top

(Testimony of R. A. Hawkins.)

of No. 3 and drifted down to the bottom of No. 4, as a rule. I could not tell where the fish were caught. I do not know what the difference was between the two sites; I don't think there was much. The first part of the fishing season we did well on No. 3, the last part on No. 2. The practical time for catching salmon on this site begins about July first and lasts until the twenty-fifth of August, when the fishing season is closed by law. It is not profitable to fish before the first of July. I think these salmon which were caught during the year 1908 were worth somewhere around five cents a pound; five or six cents, I am not sure. I would not want to say; the prices vary and there have been so many prices and part of the season would be higher than at other times; but I should say somewhere around about five or six cents. We operated these grounds during the year 1909. In 1908 we put in close to 130 tons to 140 tons, and in 1909 we put in about 100 tons, or a little over. The price for 1909 was five and a half and seven cents, I think. In 1910 we put in somewhere around 130 tons and the price was five and a half and seven cents. These are the two extremes; that is five and a half for the small fish under twenty-five pounds, and seven cents for fish over twenty-five pounds. I could not say for sure how the average for small and large fish were, but it must be about equal, half and half. Some years it runs mostly small and others differently. **[202]** This year (1910) I think they are about half and half. I think it was about ten years ago that the

(Testimony of R. A. Hawkins.)

gill netters took out the trap that was driven in front of Sand Island. They took it out by force. There were about 4000 gill netters on the river and they took out this trap because it was in their way. On the 20th day of June, 1908, we began cleaning up our ground. I was instructed by the vice-president of the plaintiff to remove these buoys that were placed on said sites by defendants and did so accordingly.

Redirect Examination.

Q. You are asked by counsel for defendants concerning the number of fish caught on these grounds during 1908, 1909 and 1910. Did the Columbia River Packers' Association make any money or did it lose money in the operation of these grounds in 1909?

To this question counsel for defendants objected on the ground that it was immaterial.

A. In 1908 after the fishing season was all over I went over and asked the company how they came out, as I generally do in all my business, and they said they did not quite come out even. That was the first year we operated they didn't come out quite even.

Counsel for defendants moved to strike the above answer as not being responsive and also hearsay.

Q. Did you examine the books?

A. I had mostly to keep track of more than they did, although they had the books. I knew exactly how it was. I was not certain if we had made a few dollars or lost a few dollars, [203] and when the

(Testimony of R. A. Hawkins.)

secretary asked if they had the report made up he was told no, and he said to run over it roughly, that he would like to know.

Q. You have certainly examined it?

A. Yes, sir.

Q. Did you know of your own knowledge whether they made or lost?

A. We lost a little the first year.

Q. What about the year 1909?

To this question counsel for defendants objected upon the ground that the same was immaterial.

A. The second year we lost between four and five thousand dollars.

Q. And the third year?

A. That is this year, I think we made a few dollars.

I saw these sites shortly after the lease was executed by the Government to the plaintiff and none of these buoys were there or in front of said premises. These buoys were arranged from 50 to 60 or 75 feet from below the line of zero tide and there were two buoys on each location, one on the inside and the other on the outside; two buoys to each set net and the distance between these two buoys was about 100 feet. I think there were nine buoys on the inside and nine buoys on the outside, making eighteen buoys altogether, although I am not positive. I do not think they all had two. They might have been there in the night and gone out in the morning, because if the gill netters come along and get caught they would take them out.

[Testimony of E. E. Woodfield, for Plaintiff.]

Mr. E. E. WOODFIELD, a witness on behalf of the plaintiff, after being first duly sworn, testified upon interrogatories propounded to him by counsel for plaintiff, as follows: **[204]**

I am twenty-eight years of age and live at Astoria, Oregon, and have lived there twenty-eight years, and am a seine fisherman by occupation and have been engaged in such business for the last twelve years. I have been foreman of seining for the last five years, all on the lower Columbia River, and am familiar with the manner of handling seines in the waters of the Columbia River known as the lower Columbia River, and have been, as I have said, for twelve years. I am now in the employ of the Columbia River Packers' Association and have been so employed steadily for the last two years in the capacity of seining foreman. The duties of a seining foreman are in the nature of an overseer, seeing that the grounds are in shape and handling the crew in actual operation. I had charge of Sites 2 and 3 on Sand Island during the years 1908, 1909 and 1910 as foreman for the Columbia River Packers' Association. I had never been on the island before that time, but had been acquainted with it, known it and seen it for the last eighteen years. There is only one island by that name near the mouth of the river. I went on the island on the twentieth of June, 1908, with five men, one gasoline launch, and a team of horses for the purpose of preparing the ground and making

(Testimony of E. E. Woodfield.)

roads to haul fish over, fixing up the houses and making preparations for fishing operations, and we were ready to seine on the second day of July. We began seining on the third day of July. The reason we did not begin on the morning of the second was that they were setting out these buoys and we had orders to take them out. I always thought there were eight buoys, one at the upper end of 3, one on the lower end of Site 2, and the others were distributed between them. I have no knowledge of there being other than eight buoys. I pulled these buoys out on the third day of July. We took out five. We did so under the orders of **[205]** Mr. R. A. Hawkins, the witness who just preceded me. There were more than that there but that is all we needed to take out at first, and not being acquainted with the ground we did not know exactly where the lines were at the time. We measured the water when we hauled up these five, and the shoalest was four and a half feet, and I think the deepest was a little over eight feet, and were about 60 or 70 feet from the shore. The first ones were made out of large rocks and a hole bored in and a wire cable put through and a cedar bolt put down and the wire running through one end, with the numbers nailed on the bolt. The first ones weighed about six or seven hundred pounds, probably up to a thousand pounds. We could not successfully land our seines with these buoys in there. We waited, I think, until the next day, when they put in more buoys. We were seining when they were put in. Stensland was one of the men who put them in

(Testimony of E. E. Woodfield.)

and the other man, I think, was Walter Bussey. They were on the launch "Standard" owned by Mr. McGowan. We took these buoys out immediately. I had a talk with these men and one asked us what we were doing, and we said we were cleaning the grounds, and he asked if we knew we were destroying other people's property, and we told him that we did, but that we had orders to clear the grounds and he said "That is all we want to see," and went away. I took out seven buoys the second time. They were all in front of Sites 2 and 3. Such sites were valuable only for seining purposes and I do not think they were valuable for any other purpose. When I first went down I saw a net attached to one of these buoys there one or two days. One end of it was attached to the buoy and these two men were hanging on to the other end of it. It was attached to their boat. They were doubtless attempting to fish, but I don't think they could have got any fish. The Columbia River Packers' Association had on these grounds, six seines, six seining skiffs, two gasoline launches, **[206]** twenty-four head of horses, thirty-seven men, two cooks, a receiving scow, cooking outfit, harnesses, etc. The total value of the equipment, exclusive of horses, was between ten and eleven thousand dollars. The horses were worth about $250 each. All of this equipment was necessary in order to operate those grounds. We maintained a crew right along of forty-six men, and we also kept twenty-four horses and all the above equipment during the entire season up to the

(Testimony of E. E. Woodfield.)

twenty-fifth day of August, and the expense per day of operating those grounds was not less than $200. In my judgme[illegible] they could not have been operated any cheaper to get the full value of the grounds. These sites that I speak of are the ones indicated on the blue-print attached to Plaintiff's Exhibit "E." The State boundary line between Washington and Oregon is supposed to be north of Sand Island.

Cross-examination.

All I know about the location of the State boundary is what I have heard and from maps. I have seen different maps of the Columbia River. The only map I ever saw was printed in the "Astoria Budget." It was gotten out so that persons could tell where to get licenses. This is a newspaper printed at Astoria. This is all I know about it.

The ground where these buoys were never went dry at any stage of the tide. I have fished a little with a set net at Youngs Bay back of Astoria about a mile. A set net is made out of linen twine about thirty or forty meshes deep according to the water and size of fish you want to catch. It is hung on a cork line and lead line, and tied with one end of the net on shore and the other out to a pile. I knew at the time I removed these buoys that they were put there for a set net location. [207] Their license number was on each and was marked with black printing, five or six inches high, on the floats. In 1908 we caught on these grounds over 135 or 140 tons. In 1909 a little over 100 tons, and in 1910, 135

(Testimony of E. E. Woodfield.)

tons, or a little more. We weighed the fish on the grounds at the receiving scow. This same equipment has been used on other ground, excepting the seines, they would have to be altered. The seines must be made to fit the grounds. The company had owned the boats, skiffs, and launches before the lease was executed, excepting one launch which was built new. The company has three or four other fishing grounds.

Redirect Examination.

There were no numbers on any of these set nets placed on the shore, or on the shore or any place except upon the buoys.

Recross-examination.

To use a seine successfully a man should fish when the tide is falling and try to cover as much ground as possible to fully take it in and with these set nets there with the buoys they could not cover any ground except to go out and come right in the way they went out. These set nets, I should judge, were from 300 to 400 feet apart. There were no obstructions between them. But you could not fish at all on the running tide on that space of ground. The seine was over 1500 feet long and you could not take it out and bring it back in that space, and if you had a shorter seine you might just as well not seine at all, for the reason that you could not catch any fish with it. You might, of course, catch some, but it was necessary to employ a seine as big as possible. The bigger they were the more space they covered. It took ten horses to land one of these

(Testimony of E. E. Woodfield.)

seines, four at one end and six at the other. You hitch the horse to [208] the end of the seine and drive them in shore. We lay one end on the beach and go out and come in with the line and keep hauling the line until you get both ends in and then haul in bodily. They catch in one haul all the way from nothing to 400 fish.

[Testimony of R. A. Hawkins, for Plaintiff (Recalled).]

R. A. HAWKINS was recalled as a witness on behalf of plaintiff and testified upon interrogatories propounded to him by counsel for plaintiff, as follows:

Q. I hand you a map attached to the opinion of the Supreme Court of the United States rendered in the case brought by the State of Washington, complainant, vs. The State of Oregon, defendant, decided November 16, 1908, marked "Oregon's Exhibit No. 16, C. C. Dalton and John W. Reynolds, Commissioners," and ask you to examine the island shown on that map within the heavy lines marked "Sand Island" and ask you to state whether or not that is the Sand Island referred to as containing Sites numbered 2 and 3 in the lease, and the island you have been testifying about and from the shore of which you have done the fishing referred to.

A. Yes, sir. That is the island.

Whereupon, counsel for plaintiff offered said map in evidence in the case. It was stipulated, however, between the parties that the map need not be filed but may be considered in evidence and referred to at

the trial of the cause. Counsel for the defendants made the following objection, namely: We have made no objection to the map being referred to without being filed inasmuch as it is part of the decision of the Supreme Court of the United States in the case mentioned by counsel, but we do object to it as incompetent for any purpose in this case, but it may be considered as actually in evidence and may be read at the hearing subject to the above objections.

Stipulation [as to Ownership of Majority of Stock]. [209]

It is stipulated between the respective parties, as follows: It is admitted that the majority of the stock of the plaintiff is owned by citizens of the United States.

Stipulation [as to Anchors and Buoys].

The following stipulation was entered into between the parties to this suit, to wit:

It is admitted that the defendants put in the anchors and buoys referred to in the evidence herein, and also replaced the same from time to time as they were taken out by the plaintiff before the injunction was issued.

Upon the introduction of the foregoing testimony the plaintiff rested.

The defendants to sustain the issues on their part thereupon offered and introduced the following testimony in evidence:

[Testimony of E. A. Coe, for Defendants.]

E. A. COE, a witness on behalf of the defendants, after being duly sworn testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is E. A. Coe and I reside at Svensen, Oregon. At the present time I am in the mercantile business, but for a number of years I was a professional photographer. This picture that I have in my hand was taken from the hill back of Fort Columbia, State of Washington, looking towards the mouth of the Columbia River. I took it in the month of May, 1909.

Counsel for defendants then offered the photograph which the said witness identified, in evidence. To the introduction of the same in evidence the plaintiff by his attorney duly objected on the ground that the same was immaterial and [210] irrelevant and not within the issues.

Whereupon said photograph was received in evidence and marked as Defendants' Exhibit No. 1, and the same is so marked and hereunto attached and made a part hereof.

This photograph that I have in my hand was taken by me on the fourth day of July, 1909. Sand Island is indicated on said photograph by the letter "x" in red ink. The Washington shore is indicated by the letter "a." I stood at Scarboro Hill the time the photograph was taken and it was at a stage of low water. The photograph shows the sands showing through the water. You can see the light spots.

(Testimony of E. A. Coe.)

The water is a few inches or a few feet deep; the dark spots show the shoals. At low water a man might, if he had rubber boots on, walk from the shore of the State of Washington to Sand Island, and I have done it, that is, I have walked across here (indicating), but not the entire distance. We took a skiff to go out to Sand Island and had to pull the skiff over the mud and sand out there, and there was no spot in it that I could not have walked with rubber boots on without getting over the tops of the boots. This was on the fourth day of July, 1909. We started from Chinook in the State of Washington. The place I refer to is Sand Island, in the Columbia River, and Chinook is on the mainland, in Washington.

Counsel for the defendants then offered the witness another photograph, which the witness identified and stated and said:

I took it May 21, 1909, at the same time the other was taken. It is correct, that is, as correct as possible to make a photograph and show the scene. It was taken from Scarboro Head on the high land near the shore of the Columbia [211] River, in the State of Washington. The little village is shown on this map; so is Chinook, and it shows the Columbia River. Sand Island is also shown on this photograph, being at a spot marked "x" in red ink. At the time I took this photograph it was low tide.

As I stated a few minutes ago, this picture was taken at the time I started across the Columbia River from Chinook to Sand Island and shows the same

(Testimony of E. A. Coe.)

thing, only that this picture is taken on a large scale. It is the same as the other photograph but on a larger scale. I certainly think a man could walk from the Washington shore to Sand Island at low tide. I am satisfied he could from what I stated a few minutes ago. We took a skiff and went out there and picked our way through these places, and had to walk from here to here (indicating). We walked back and forth, and I know we joked at the time about walking from Oregon to Washington.

Thereupon counsel for plaintiff offered the photograph to the witness just testifying in evidence. Counsel for the plaintiff then and there objected that it was immaterial and irrelevant and not within the issues.

Thereupon said photograph was received in evidence and marked Defendants' Exhibit No. 2, and the same is hereunto attached so marked and made a part hereof.

I am not interested in the result of this action. I came here at the request of the defendant, Mr. McGowan.

Cross-examination.

At the time I took this photograph it was between the hours of seven and nine o'clock at an exceedingly low run out. I think the tide table gave below zero tide. I made the picture when I was asked to make it. I had nothing to do about the [212] selection of the time. The day and date was set for me. I did not attempt to cross from Chinook to Sand Island on that day and neither did anyone attempt to travel

(Testimony of E. A. Coe.)

from Chinook to Sand Island at that time. It was on the fourth day of July that I went from Chinook, Washington, to Sand Island, Oregon. Chinook is northeast from Sand Island, considerably more east than north, and is supposed to be in the neighborhood of a mile and a half or two miles. Guessing at it, it is from between one to two miles. Three of us started in a launch about twenty-five or twenty-six feet long, and couldn't make it, and then took a flat-bottomed skiff along. We couldn't get along with the launch. Making the trip across we rowed the boat probably a quarter of the way. The boat would float in six or eight or ten inches of water. The rest of the distance we walked. I never knew of anybody walking between said places without a boat, or making any attempt to do so. No one would be foolish enough to attempt the trip without a boat, although I think they might make it.

Redirect Examination.

From what I saw and observed and from my experience, I think it would be possible for a man at an ordinary low tide to walk from Chinook to Sand Island.

[Testimony of J. F. Ford, for Defendants.]

J. F. FORD, a witness on behalf of defendants, after being first duly sworn, testified in response to interrogatories propounded by counsel for defendants, as follows:

I am forty-nine years of age; reside at Ilwaco, Washington. I am a photographer by occupation

(Testimony of J. F. Ford.)

and have been engaged in such business for sixteen years. [213]

Here witness was handed a photograph. (Defendants' Exhibit 3.)

I took that photograph in May, last year, and it is a correct picture of the view. It was taken from the center of the bluff called "Cape Disappointment" at Fort Canby, in the State of Washington, and is a picture of the island at the mouth of the Columbia River, and takes in Scarboro Head and Sand Island out to the ocean view.

Counsel for defendant then offered said photograph in evidence. To the introduction of which counsel for plaintiff then and there objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Defendants' Exhibit No. 3, and the same is hereunto attached and so marked.

I have marked on this picture "Sand Island," also "Scarboro Head" and "Cape Disappointment," and it was from these points I took the picture. Scarboro Head is in the State of Washington, and at the time I took this picture it was low tide. Sand Island is something between two and three miles from Scarboro Head right west. When I took this photograph I was standing in the middle of the bluff at Cape Disappointment in Washington. I took the top of these trees and rocks on the same bluff as I took this. I lose the rocks and catch the sand. I pointed the camera east and took a view of Sand

(Testimony of J. F. Ford.)

Island. I took each photograph separately. Photographs numbered 1, 2, 3 and 4 I took from the same position. Numbers 5 and 6 I moved to a second point on the bluff by the lighthouse and this gives you a view of Sand Island, Scarboro Head and Cape Disappointment looking east. Number 2 is changed two degrees from the southeast from number 1. Number 3 is a few degrees further around to the southeast, and number 4 I would say directly south from [214] Cape Disappointment showing the end of the jetty, and number 5 a little more to the southeast, and number 6 looking west from the lighthouse, and number 7 would be looking northwest. And these views make a continuous connective view of the premises included within said territory and make one panoramic view thereof. (Here witness was handed Exhibit No. 4.) I took this picture on July fourth, the date written on the back thereof. It is a correct view, shows Sand Island to the south, Scarboro Head to the east and looking to the southeast, from the inner side of Sand Island at what is called the bend looking out to the southeast.

Thereupon counsel for defendants offered said photograph in evidence, to the introduction of which counsel for plaintiff objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Exhibit No. 4, and the same is hereunto attached and so marked.

When I took this picture I was possibly a mile and

(Testimony of J. F. Ford.)

a half northwest of the east end of Sand Island. I pointed the camera southeast and we took the channel at low water. The people shown in this photograph are some boys playing ball on the sands between the island and the State of Washington in the channel. It was not hardly dry there, there was about three inches of water. The boys went out with their baseballs expecting to play ball as the sands go dry, but a little wind kept some water on the sands that morning, so they were wading about. The sands were bare north of us at low tide. We waded in this little channel that was left, in the three inches of water. I am acquainted with Sand Island and know it is the one mentioned in this suit, and it is the only island there known as Sand Island. South of this island it is deep water all across the river, and fishing, seining and gill netting [215] are done there. At low tide it is simply a mud flat island to the high land.

Cross-examination.

I took the picture, Defendants' Exhibit 4, about nine o'clock in the morning. Exhibit No. 3 about the same hour but at a different time. The width of the channel between Sand Island and Scarboro Head is close to two miles.

[Testimony of G. B. Hegardt, for Defendants.]

G. B. HEGARDT, a witness on behalf of the defendants, after being duly sworn, in response to interrogatories propounded to him by counsel for defendants, testified as follows:

My name is G. B. Hegardt. I am a civil engineer

(Testimony of G. B. Hegardt.)

by profession and have been actively engaged in that business for the last thirty years. I worked twenty-four years for the United States Government in the capacity of an engineer on the river and harbor improvement and fortification works. I worked first in Illinois seven or eight years and the last sixteen years at Fort Stevens, from 1880 to 1905. Fort Stevens is at the mouth of the Columbia River. I am acquainted with Sand Island and have been acquainted with it since the fall of 1880. I was engaged in such work making numerous surveys for the Government of the United States in that vicinity. Sand Island is a body of land lying between the Washington and Oregon shores, the east line being about two miles west of Fort Stevens.

Thereupon counsel for defendants offered in evidence a plat for identification and the same was received and marked as Defendants' Identification No. 5, and the same is hereunto attached and so marked.

This map is from June, 1908, to the present time. Sand Island is marked in black and this survey was made in June, 1907, and the island was in the same position in 1908. The change [216] is very small. At that time there was no north channel in 1908.

Stipulation [That Plaintiff Has an Objection to Certain Questions, etc.].

It was here stipulated and agreed between the parties that the plaintiff has an objection to all questions touching the present and past locations of Sand Island, and also the question as to whether or not there is a channel between Sand Island and the

Washington shore and all matters relative thereto and all questions propounded to any witness relating to such channel on the ground that the same is incompetent, irrelevant and immaterial and not within the issues, and it is not necessary to note such objections, the same being preserved without repeating same.

The reason the island is in practically the same position is because at low water there is a continuous sandspit between Sand Island and the Washington shore. It is dry then and no channel exists, and this was apparent in June, 1908. And since that time the conditions would not be as favorable for a channel being between the island and Washington as in 1908, because the shoaling is continually going on, continually increasing. I suppose at high tide a boat could come and go in the channel between Sand Island and Washington, that is, boats of light draft could come and go out. Of course, it is impossible at low water or even at mid-tide. There is only one main channel in the Columbia River and that is south of Sand Island. On this map the mid-channel line of 1905 is shown by the continuous black line marked "1905 channel line" on this chart (Defendants' Identification 5) and extends from the sea to Astoria. The main ship channel at the present time is practically on the same line as indicated on the line marked "1905 channel line." Sand Island is not in the same place in the Columbia River that it was in 1854. It has moved considerably north and west. Its movements [217] were gradual, caused by erosion on the south side of the island and accretion on the north side of the island. Sand Island as situated

is entirely north of any channel that is or can be used or employed for boats or vessels or water craft plying such waters. There are, of course, two kinds of boats, sea-going vessels and river steamers that might navigate the waters. As far as sea-going vessels are concerned, I don't think that the north channel of Sand Island has been used since 1875, and in any case not since 1878 or 1879. This map, marked Identification No. 5, is called United States Coast Geodetic Survey. This is prepared from surveys made by the United States engineers as to hydrography. The survey was made in June, 1907, by U. S. engineers. I prepared this map for Mr. McGowan showing the position of the present channel lines with the channel line which existed in 1854. I have marked on this map the boundary line as claimed by Oregon and I took it from the official records and I also put on this map Sand Island in 1854, and it is correctly located from United States survey made at that time. The north channel at that time as shown on this map in red and marked "north channel line, 1854," starting from the ocean and coming easterly and north of Sand Island and joins the main channel directly opposite Fort Stevens. I also placed on the map from the official survey chart of the Coast Geodetic Survey of 1874, the north channel of 1854 and the lines on this map (Defendants' Identification No. 5) are correct and made from the Geodetic Survey of the United States of 1854, and it is the same map that was prepared by the State of Washington and used in the suit between the State of Washington and the State of Oregon to determine the boundary line be-

tween the two States, and the testimony in that case was taken during the year 1906 and I understand this action did not arise until three years later. Since 1906 the [218] changes upon Sand Island have been very small. Since the construction of the jetty and building up of the spit, the changes have been very small, but there are some changes, eroding on the south and building up on the northwest.

Thereupon counsel for defendants offered in evidence the map that the witness had been testifying about. To the introduction of which the plaintiff by its attorney then and there objected, upon the ground that the same was immaterial, incompetent and irrelevant and not within the issues.

Whereupon said plat was received in evidence and marked Defendants' Exhibit No. 5, and the same is hereunto attached so marked.

I stated that Sand Island as given on this plat was made from surveys of the United States Government taken in 1907. There was only one channel in 1907 in that vicinity. The present, or 1907 channel, is about due south of Cape Disappointment, about a mile south of the 1854 channel, and the two channels meet at Fort Stevens. The north channel has disappeared and is now covered by Sand Island and mud flats. This north channel disappeared by encroachment of Sand Island and the filling up of Bakers Bay with sediment and sand washed over Sand Island from the spit and the channel, and also from sediment coming down the river. Sand Island as it existed in 1854 was nearly a mile and a half south at the eastern end and about three miles and a half at

the northern end of the present island, that is, the present island at its northwest end is three and a half miles north of the Sand Island in 1854. The same island in 1854 was south of the north channel line of 1854 and the Sand Island that existed in 1908 and which exists now is entirely north of the present channel in the Columbia River. Sand Island as it exists to-day does not cover [**219**] any part or portion of the territory, State or ground that was occupied by Sand Island in 1854. The present Sand Island is entirely separated or away from the position of Sand Island in 1854. There is a deep channel between it having as high as sixty feet of water and one mile wide. This channel as it now exists is entirely south of the present existing Sand Island. In 1884 the channel was north of Sand Island. The Sand Island as placed on this map and marked "1854" in red, was placed there by me and was made from the United States Coast and Geodetic Survey of 1854. The blue line marked on this map was placed there by me, that is the blue line marked "boundary line" as claimed by the State of Oregon.

Stipulation [as to Defendants' Exhibit No. 6].

It was here stipulated between the parties that the authenticity of this map is not questioned.

Thereupon counsel for defendants offered in evidence said map, to which the plaintiff, by its attorney, then and there objected upon the ground that the same is immaterial, irrelevant and incompetent, and not within the issues, although it is not questioned that it was made by the United States Geodetic Survey.

(Testimony of G. B. Hegardt.)

Whereupon said plat or map was received in evidence and marked Defendants' Exhibit No. 6, and the same is hereunto attached so marked.

Thereupon counsel for defendants offered in evidence another map, Defendants' Exhibit No. 7, which was received in evidence and marked Defendants' Exhibit No. 7, but counsel for plaintiff objected to the introduction of the same upon the ground that the same is immaterial, incompetent and irrelevant and not within the issues, but does not object to the map that [220] it was not proven, its correctness not being denied.

(G. B. HEGARDT continuing:)

This map was made by the United States engineers and compiled from records actually made. The soundings indicated on this map are the soundings taken by the officers of the United States Geodetic Survey and the figures refer to low-water datum plane. The soundings are expressed in feet and show the depth of the mean of the lower low water. This means that the soundings taken at any time were reduced to the datum plane established by the United States Geodetic Survey and the figures are given in feet. The reason there was no soundings north of Sand Island is because it was not covered by the survey. I think there was no necessity for a survey there for the reason there was no water that could be used for navigation, and it was not necessary to go to the expense of making a survey there. As a general statement, I would say that at low water there is no channel existing between Sand Island and the

(Testimony of G. B. Hegardt.)
Washington shore, and this was apparent in June, 1908, and if there has been any change since it would be that the depths would be getting less, that is the tendency.

Counsel for defendants then offered another map in evidence. To the introduction of which the plaintiff, by its attorney, objected upon the ground that it was immaterial and irrelevant and not within the issues, but made no objection as to its authenticity or correctness.

Whereupon said map was received in evidence and marked Defendants' Exhibit No. 8, and is hereunto attached so marked. [221]

(G. B. HEGARDT continuing:)

This map, Exhibit No. 8, is a map made and prepared by the United States engineers, upon which I have put in red what I claim to be the present location of Sand Island, also the words "the low-water line of Sand Island from 1910, shown in red, is from United States Engineer Department survey hereto attached of the mouth of the Columbia River, June 1910." The paper referred to there is Defendants' Exhibit No. 7, attached hereto. In showing the present location of Sand Island on this plat (Defendants' Exhibit No. 8) in red, I took the data so as to form Defendants' Exhibit 7. I have been making surveys in the vicinity and around Sand Island since 1888 and in Bakers Bay and the mouth of the river from the bar to Astoria.

Starting at the beginning the first record of any survey of Sand Island by the United States Govern-

(Testimony of G. B. Hegardt.)

ment is the survey of 1839; it is shown as Sand Island, and is bare at low water. That is our first record, and from that on Sand Island has increased in elevation and size. Its location in 1839 was well south of where it is now, probably two miles south of the present island, and since that time its movement has been gradually to the north. Taking the center of the present Sand Island and compared with the location of the center of Sand Island in 1839 the distance is probably about three miles north of the location of 1839, and it is to the west also, that is to the north and west. The present Sand Island did not occupy any part or portion of the space or territory of the original island. There is a space of practically two miles between the location of Sand Island in 1839 and its present location. There is a channel between them. The present ship channel is between the 1839 location and the present location. This movement has been gradual by building up on the north and breaking away on the south, that is, the washing was entirely on the south, as a rule. [222]

I am, of course, familiar with the ships and vessels that are engaged in trade and commerce and the only channel used or employed by such ships, or that could be employed by such ships, was south of Sand Island and between Sand Island and the Oregon shore, and it was and would be impossible for such vessels to navigate the waters between Sand Island and the Washington shore at any stage of the tide. The average rise and fall of the tide is counted as seven feet and a half. The tides in the winter-time are as

high as twelve feet above low water in storms, but the average is seven and a half feet, and it is about the same at Astoria and about the same at Ilwaco in the State of Washington; a very little difference. The depth of the water at the present time where Sand Island was in 1854 is between sixty and seventy feet, and this was true in 1908. South of Sand Island as it is now, the water in the channel is from sixty to seventy feet and north of it at low tide it is practically dry from the island to the mainland in the State of Washington.

In making charts the officers of the Geodetic Survey of the United States use as their basis the low-water plane, the high water not being given for the reason that low water is a constant factor in tidal waters and rivers, and it is based upon the records kept from ten to one hundred years, while the high water is a variable quantity and varies from year to year and from season to season, so that the low water is adopted, and all soundings made under the authority of the Geodetic Survey refers to low-water datum and all rises of the tide. The seven and a half foot tide I just referred to, is above low-water datum plane. Now the average between high low water and low low water is generally called zero tide. For instance, you have here three feet above zero and some neap tides two feet above, and you take the average of all low water and call that the average. This is the harmonic plane that is adopted. [223]

Cross-examination.

Q. Pursuing that question of the datum, you speak

(Testimony of G. B. Hegardt.)

of lower low water. What do you mean by that; is that below what is known as zero tide referred to by the Government tide tables, or do you mean zero tide?

A. Zero tide is the average of low low waters.

Q. Then when you speak of zero tide and lower low waters, you mean the same thing?

A. In this particular case it is lower low waters.

Q. Is that zero?

A. That is what is accepted as zero.

Q. Then in going over the tide tables prepared by the Government, wherever it is referred to as zero tide, that is lower low waters?

A. Yes, sir; that is the mean of the lower low waters. I am well acquainted with Ilwaco and have been for some time. There are railroad docks there. At least there were some, and I suppose they are still standing. I do not know the population of the town of Ilwaco, and I suppose people there are employed in navigating the waters between Sand Island and the Washington shore. I suppose there are gasolene launches and during the fishing season they are probably plentiful. At high tide a great many sail-boats and launches are navigating such waters. I do not think any stern wheel boats navigate these waters, but these waters afford quite a traffic for fishing boats, gasolene launches and sail-boats in the fishing industry. There was very little difference in the condition of the channel, if any, between Sand Island and the Washington shore in 1906, excepting that there was a general filling in of the whole of Bakers Bay, and this filling in has been quite rapid of late.

(Testimony of G. B. Hegardt.)

It has been going on prior to 1906 so that anyone can see that it is only a question of time when there will be no water between Sand Island and the [224] Washington shore. I was the consulting engineer for the State of Washington in the suit brought by that State against the State of Oregon to establish the boundary line between these two States. I was employed by the State of Washington and I gave my testimony in that case. I stated all the facts I had to my knowledge in order to establish the contention of the State of Washington, and it was established in that case that the water was very shoal between Sand Island and the State of Washington, which is the same testimony had there as I have testified here. There is practically no channel between Sand Island and the State of Washington, and all such matters were duly presented to the Supreme Court of the United States at the hearing in that case, and practically all that I testified to in this case was shown in that case. The conditions have changed appreciably since that time; I should say that on the inside of the island I think the water is much shoaler, at least two feet shoaler. I am not prepared to say, however, whether it has increased in the same proportion in the last two years as it had in the two years preceding, but in the case above referred to, State of Washington vs. State of Oregon, it was shown that all of that territory covered by the waters north of Sand Island were shoaling very rapidly.

Q. And the Supreme Court of the United States determined the boundary line between the State of

(Testimony of G. B. Hegardt.)

Oregon and the State of Washington accordingly as delineated on this map by that blue line marked "boundary line as claimed by the State of Oregon"?

To this question counsel for the defendants objected upon the ground it was calling for a legal conclusion.

A. Yes, sir. [225]

Sand Island has always been an island and its identity has always been complete in one solid body and it has always been known as "Sand Island." It has never washed away except it has gradually washed away on one side and filled up on the other. Between Sand Island and the Washington shore there are many pound net fish traps. These are constructed by driving a row of piling in the bed of the river, and it is a disputed question as to whether or not these traps have in any manner contributed to the building up of the sand in the north channel. Of course, where there is silt carried in suspension in the river and meets an obstruction it is likely to be deposited. There are three or four hundred of these traps, but I do not think that these traps are the sole cause, not the principal cause of the shoaling between Sand Island and the Washington shore. In my judgment the principal cause is substantially as follows: The principal deposit is by sand washing over the spit and carried in suspension and forced over by the flood tide into the neutral water, and more sand is carried in suspension than is carried down by the river. It is the sand that is carried by the flood waters into the neutral waters, and it is simply the law of nature

(Testimony of G. B. Hegardt.)

which is the main contributing cause. Of course, these innumerable traps are an incident. The natural tendency for that place to shoal is caused by the current deflecting south and making a spit in waters where the current is slow, or neutral most of the time.

Redirect Examination.

The Government of the United States has been engaged in building a jetty at the mouth of the Columbia River, and I think that these jetties are responsible for most of the filling in in Bakers Bay between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined [226] between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined between the end of the jetty and Cape Disappointment, and would not have time to overflow elsewhere, but comes into Bakers Bay and fills it up, and that is the reason. The O. R. & N. found it necessary to abandon their boats to Ilwaco on account of the shoaling of the waters and they now have their station at Megler on the Washington shore. I think the station was built some time in 1906, but I am not sure.

Q. Speaking now with reference to the north channel, state whether or not that has gradually worked to the south; in other words has the water in the north channel been gradually going south until it is now south of Sand Island?

Mr. FULTON.—That is objected to as a conclusion.

A. I would say that where the north channel was

(Testimony of G. B. Hegardt.)

before, of course, there was a channel or space through which the water would flow. The river requires a certain cross-section to take care of the volume of water and when the north channel occupied by the old north channel was filled up, it was natural that the body of water which flowed through that space would move south where it was unobstructed, so that the water really moved south of Sand Island.

Q. Until it is now where?

A. The place marked by the 1905 channel line, on Exhibit 5.

Mr. DORR.—What you mean then is that the water has shifted and gone south instead of the land moving?

A. Yes.

(By Mr. FULTON.)

Q. Then, you have now evolved the doctrine that because the channel has gradually grown shallower and unable to accommodate the water that formerly went through it, that [227] consequently the water goes in another direction and that constitutes the channel.

A. When that question was asked before I did not understand it with reference to a channel, but when they mentioned the water, it is plain, that if there was no space for the water to flow through, it was forced in some direction where it was unobstructed, and that was south, the only direction where it was unobstructed.

Q. Then it would naturally follow that if the same volume of water was in Columbia River when the

(Testimony of G. B. Hegardt.)

major part flowed through the north channel, and the north channel became shallower, more water would run in some other place? A. Yes.

Q. But it would not necessarily follow that the north channel had shifted down there, but simply that the other channel had widened sufficiently to accommodate the water, wouldn't it?

A. The channel would have to widen and move sufficiently to accommodate the water.

Q. Simply the water formerly running through the north channel is now accommodated by the south channel.

A. For the reason that the old north channel is now occupied by sand.

Q. The south channel has always been in existence and it sufficiently enlarged itself to accommodate the volume of water that formerly passed through the north channel?

A. It simply forced the north channel out of existence.

Q. But it did not change the south channel to the north channel did it?

A. In this way that where it was formerly a channel is now occupied by the island and the channel moved with it. [228]

Q. But you don't mean to argue that because the south channel widened sufficiently to accommodate the waters occupying a former channel, that thereupon the south channel was pre-empted by the north channel?

A. No, it combined with the north channel.

(Testimony of G. B. Hegardt.)

Q. Which one is the south channel now; is it the north channel or the south channel?

A. One is the main channel.

Q. It is still the south channel, only it is larger?

A. Yes.

(By Mr. WELSH.)

Q. Is there any north channel now?

A. No, that is out of existence.

Mr. DORR.—Q. And both channels are running through the south part of the river?

A. Yes.

Mr. FULTON.—Q. You mean that the water that formerly ran through the north channel is now running through the south?

A. Yes.

Mr. WELSH.—Q. The north channel having shoaled up?

A. Yes, disappearing and being forced out of existence.

[Testimony of H. S. McGowan, for Defendants.]

H. S. McGOWAN, a witness on behalf of defendants, after being duly sworn, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is H. S. McGowan. I am one of the defendants in this suit. I am forty-four years of age and reside at McGowan, Pacific County, Washington. I was born there and have resided there most of my life. I am acquainted with the other defendants, J. P. Coyle and Erick Lindstrom. I have known Sand Island so called [229] since the time of "Great

(Testimony of H. S. McGowan.)

Republic" wreck, which, I believe, was in the year 1879. This ship was wrecked on what is called the Republic spit, a body of shoal water that is extremely rough and exposed off the south—southwest of the main body of Sand Island. I am engaged in the salmon business, both packing and fishing. We operate at Ilwaco, Washington, McGowan, Washington, and Warrendale, Oregon, the latter place is on the upper river, and the other two are on the lower river in Pacific County in the State of Washington near the mouth of the Columbia River. I have been engaged in such business since about 1882 or '82 or '4, and associated with me in such business are my brothers and father. It is a corporation known as P. J. McGowan & Sons. My father's name is P. J. McGowan. He became engaged in the fishing business at McGowan about 1852. We did not begin canning salmon, however, until 1884, and myself and brothers have practically grown up in the business. I have fished on the south side of Sand Island prior to 1908. The first time I fished there was along about 1896, with traps, and filed notice; that was on the southwest side of the island in the channel that existed there at that time, between the island and Peacock spit. Then it was called the Oklahoma channel, and there were a great number of traps in there and we operated some along with other people. That channel finally became obliterated by the encroachment of sand from Peacock spit and Republic spit, and was gradually filled up. Peacock spit extends from the shore around the environment of Cape Disappoint-

(Testimony of H. S. McGowan.)

ment and Fort Canby, while the Republic spit was outside to the south of Sand Island. The Republic spit was originally a wide shoal that was submerged at all times, and later on some portions of it came up above low water and moved off by the force of the sea towards the north and east, and two or three detached portions came out of the water that have finally become attached to Sand Island. I am familiar with the [230] regulations of the War Department with reference to permitting fixed appliances to be erected and maintained in the lower Columbia River. The War Department drew lines out there to the south and west of the island on both sides running easterly from the Republic and westerly and northwesterly outside of which lines they did not design to permit fixed structures, which in the fishing business would primarily include fish traps, but inside that line under the ruling of the Department they would permit it. This line was generally known as the fairway line and I was inside of that fairway line. I should explain, probably, that inside of that fairway line, as you call it, no permits were required from the War Department. The War Department through its engineers established a line outside of which fixed appliances were not permitted to be erected, but inside of such line no permit was required. I began fishing there along about 1901, I think it was; it may have been 1902, one of those years, with drag seines on a fishing site we purchased from other parties adjacent to where the "Great Republic" wreck was located. I think it was in August, 1901, we pur-

(Testimony of H. S. McGowan.)

chased such site from J. J. Brumbach and Son or J. J. Brumbach individually, I am not entirely clear. We bought from them a seining fishery or seining right. I have with me the bill of sale from Brumbach to McGowan and Sons transferring to McGowan and Sons such fishery and right.

Counsel for plaintiff admitted the execution of this document and the recordation of the instrument accordingly as shown thereon.

Thereupon counsel for defendants offered said bill of sale in evidence together with the certificate of record thereof, endorsed thereon. To the introduction of which the plaintiff by its attorney then and there objected upon the ground that the same [231] is incompetent, irrelevant and immaterial, and for the reason that the premises sought to be transferred were on a military reservation belonging to the United States, but does not question the execution of the instrument or the sufficiency of the proof thereof.

Said instrument was received in evidence and marked Defendants' Exhibit No. 9, and the same is hereunto attached and so marked.

(H. S. McGOWAN continuing:)

The location referred to in this bill of sale is on Sand Island, or rather it is on the shore of the Columbia River on the island, but I do not know whether it is a military reservation of the United States or not. I know the Government claims it as such, and so far as my memory goes, I understand the Government has always made that claim. J. J. Brumbach who signed the document was a private citizen and

(Testimony of H. S. McGowan.)

held no official position at that time.

After acquiring the above document we operated a fishery there for catching salmon fish. We built some temporary camps for housing a crew of men and horses. In the first place we operated from one to two scows. We also built a roadway and a small sort of a dock landing at the end of it. The Government made no objection to any thing we did there, at least not at the time we purchased it, or for some years after, one or two years after, I believe. During all the time we operated there we obtained our licenses from the State of Washington. The original licenses were gotten from Mr. Brumbach. He had obtained these from the Washington Fish Commissioner, and after that we secured licenses to ourselves directly from the Fish Commissioner of the State of Washington. I have in my possession the licenses issued to Brumbach. (Witness produces two fish licenses, one numbered 1476, dated July 17, 1901, and the other 1562, dated July 27, 1901, [232] issued to J. J. Brumbach and signed by A. C. Little, Fish Commissioner of the State of Washington.)

Thereupon counsel for defendants offered said licenses in evidence, both of the licenses themselves and the endorsements which appear on the back of the licenses. To the introduction of which in evidence plaintiff by its attorney then and there objected, upon the ground that each of said licenses were incompetent, immaterial and irrelevant.

Whereupon said licenses were received in evidence

(Testimony of H. S. McGowan.)
and marked Defendants' Exhibit 10, and the same are hereunto attached and so marked.

(Witness continuing:)

From that time on to this date we have held fishing licenses for those waters from the State of Washington every year. This fishery described in Exhibit 10 has always been termed the Brumbach fishery. It began at a point outside the shore of Sand Island, probably four hundred feet westerly from the eastern boundary of what is commonly now termed Site No. 2, and running thence westerly along the shore for approximately a distance of 3000 feet to a point west of the "Great Republic," and it extends out into the river to the limits of the ordinary nets that had been used in fishing. These nets were of various lengths running from about 200 fathoms to 250 fathoms in length. Of course they did not extend out into the water that distance. A 250 fathom net would probably have an extreme sweep out into the river of maybe 900 or a 1000 feet. I used this fishery constantly and continuously each year and season and until 1908. This was known to the plaintiff and to everybody in the country who was in the fishing business, and particularly to the plaintiff. One of the plaintiff's main witnesses, Mr. Hawkins, certainly knew it, because I have seen him there frequently on the site when we were operating [233] probably not every year, but over there frequently looking over the fishery and seeing what was caught, and I know it was a matter of common knowledge that everybody knew we owned the Brumbach fishery. Brumbach

(Testimony of H. S. McGowan.)

had operated this fishery for two seasons before he sold it to us. Mr. Brumbach located this fishery upon the ground one or two years before we bought it from him.

The Fish Commissioner of the State of Washington issued to me set net licenses for the year 1908 and these I now have in my possession. They are dated April 15, 1908, and issued to myself. I have two. My codefendants have similar licenses issued to them. These I also have with me. Erick Lindstrom has three and J. P. Coyle has three. Each are dated April 15, 1908, and we had possession of these licenses in June, 1908, and have never transferred them, and they have never been sold. We all located these set net licenses on the fishing grounds on the sixteenth day of June, 1908, and were located by anchoring buoys at each end of the ground covered by each license and fastening the license number to the buoys. The buoys were held in place by means of stone anchors, that is they were stones with holes drilled in; stones probably weighing 300 pounds, and through the holes in the stones wire cables were put and clamped on; wire cable probably 20 or 25 feet long, or 30, and on the other end of the wire cable were fastened suitable cedar buoys, probably four feet long, and about eight or ten inches in diameter, and on these buoys were fastened the license numbers. These license numbers were in black figures on light background; the figures were about seven inches long. There were two buoys to each location and these buoys were located, of course, at the place we intended to

(Testimony of H. S. McGowan.)
occupy for our set nets. All of these buoys were handled in the same manner, and the licenses for each of said sites were attached as I have heretofore indicated. We were working together to a large extent. I know that [234] this was the customary method of anchoring set nets and it was the only practical method, and I was intending in good faith to occupy these locations with set nets and I obtained these licenses for that purpose. The reason I did not obtain licenses from the State of Oregon was that the property was within the State of Washington and the rights were in the State of Washington so far as I know. That was the general understanding. Everybody acted upon that assumption, both private individuals and public officials. I did, however, obtain four licenses from the State of Oregon, and I have these with me. They are numbered O–142, O–143, O–144, O–145. I got them simply so that there would not be any question as to our rights in the State of Washington or the State of Oregon in operating my fishing rights on Sand Island. I knew that there was a controversy existing between these two States over the boundary line and I obtained these licenses accordingly as a protection so that I would have licenses from whichever state that should prevail. These licenses were issued to me on the dates they purport to bear, and I have never transferred them. I had these Oregon licenses merely to protect my rights in fishing there the best I knew how. After the defendants Lindstrom and Coyle and myself had anchored the buoys, I have just men-

(Testimony of H. S. McGowan.)

tioned, I received a call from Mr. Bagnall, Assistant United States Engineer of the Columbia River District, and he informed me that he was investigating a complaint that had been made against me for obstructing navigation.

Counsel for plaintiff objected to the witness detailing a conversation he had with Mr. Bagnall, upon the ground that the same is incompetent, irrelevant and hearsay.

(Mr. McGOWAN continuing:)

That the complaint had been lodged against me by the Columbia River Packers' Association alleging that I was obstructing [235] navigable waters of the Columbia River which were under the jurisdiction of the United States and he was going down to Sand Island in that interest and asked me if I wanted to go. I said yes, I would like to go. Then we got aboard the steamer "Arigo" and proceeded down towards Sand Island and were passing down the channel of the river just south of Sand Island, and when we got a short distance beyond the eastern end of the island we ran across a lot of gill nets which had the river practically blocked all across the channel. He wormed his way around amongst these gill nets a mile or so and came down to the vicinity of where these obstructions were alleged to be, as he said, and looked out across the west and could not see them; he then asked me where they were. I told him where they were and he pulled in close to the shore, as close to Scarboro as he could, and got out his field-glasses and made out some of the buoys along the shore there with

(Testimony of H. S. McGowan.)
his field-glasses. By that time the gill nets had gathered in thicker and closer around him, so he turned his boat about and went back and landed me at our dock and went away.

As a matter of fact, we were not in line of navigation with these buoys. After that I never heard anything further from the War Department. Shortly after that these buoys disappeared. A part or all of them disappeared one day or night, I don't remember which, and I immediately had others prepared and had them replaced. The next thing was that I learned that the Columbia River Packers' Association had forcibly removed my buoys and locations, and I immediately consulted my attorney, Mr. Welsh, for the purpose of getting out an injunction or restraining order to restrain them from interfering with my property and just before the papers were finished, I think it was, the deputy United States marshal appeared on the scene and served some papers on me. These turned out to be the papers in this suit. At the time the papers [236] were served I was actively engaged in preparing papers for my suit against them. Each of these markers cost from five to ten dollars. We placed on the ground sixteen in all; some were removed and some replaced again. I think there were placed on the ground something over twenty of these markers or buoys. The practical fishing season opens at that place usually about the first of July and continues on and until the close of the season, August 25th, I was prepared to fish these grounds, that is my set net

(Testimony of H. S. McGowan.)

locations. We had part of the gear necessary and were preparing the other. I had some gill nets on hand and we were actively engaged in buying some others at that time, and we had expended, I should estimate, several hundred dollars for an outfit that we had secured at that time. All of our set net locations were below and beyond low tide, probably 50 to a 100 feet below the line of low-water mark, extending out into the stream and none were above the line of low tide. We also had a drag seine license for that location that year. It was issued April 1, 1908, and this license was posted on the premises on a board with black letters or figures on a white or light ground, nailed upon a post at each end of the location. The number of that license was 726, issued by the Fish Commissioner of the State of Washington. I had this license at the same place I had posted our former seining licenses on the same premises. There was a post driven in the ground standing up probably five or six feet above the surface. The license numbers were painted on a board or boards in black letters about ten inches long, on a white or light colored ground, and these boards containing the license numbers were then nailed upon this stake in a conspicuous manner. This license number, 726, was placed there immediately after the license was received. It was not issued until the first of April and probably was not received from the Fish [237] Commissioner for a day or two afterward. It was posted, however, during the month of April, 1908. I took a photograph of that monument which marked my drag

(Testimony of H. S. McGowan.)

seine license. I cannot give the exact date it was taken, but it was subsequent to April 1, 1908. I took the picture myself. There are a number of boards nailed to the same post other than the one that carries the number of this 1908 license. These are the licenses of the previous years. The license number did not show very plainly. The weather had beaten the lettering off so that it was indistinct unless you get close up, but the number 726 appears prominently.

Mr. DORR.—The license that the witness is testifying about, which is 726, bears the date of April 1, 1908, and is purported to be a license for one year, ending as it is printed in this blank, March 31, 1908. This would be the day before the date that it was issued, which counsel contends at this time is manifestly an error of the expiration date by the issuing office. We may have to ask some indulgence to prove that if any objection is made against it.

Mr. FULTON.—I will stipulate that this was a mistake in the date; that the date should end on March 31, 1909.

(Witness continuing:)

This license was renewed with the same number for 1910 and again renewed for 1910–11, which is the present license. J. D. McGowan is a brother of mine.

Whereupon counsel for defendants offered the three licenses referred to by the above witness as Defendants' Exhibit No. 11. To the introduction of said licenses in evidence and each thereof, the plaintiff by its attorney then and there objected upon the ground the same are, and each was, incompetent, irrelevant and immaterial. [238]

(Testimony of H. S. McGowan.)

Whereupon said three licenses were received in evidence and marked Defendants' Exhibit No. 11, and the same are hereunto attached so marked.

(Witness continuing:)

The monument located on the ground as shown in the photograph that I have just testified about, shows my license to be No. 726, is located at the eastern end of the location line and it does not cover all the grounds that are in controversy in this case, but it covers a considerable part of it, that is about 3,000 feet, but the plaintiff occupied all of the ground covered by our license numbers. The license covers nearly all of the ground between the end limits of Site No. 2, Site No. 2 lacking about 400 feet.

Thereupon counsel for defendants offered said photograph in evidence. To the introduction of which the plaintiff by its attorney objected on the ground the same is immaterial.

Whereupon said document was received in evidence and marked Defendants' Exhibit No. 12, and the same is hereunto attached so marked.

(Witness continuing:)

This monument shown in Exhibit No. 12 is just about clear of ordinary high tide, and is quite a little ways back of ordinary low tide. I could not say how many feet back from the line of high tide, but it varies a few feet. These tides vary a few feet and at other times hundreds of feet, but at ordinary high tide I should say this post was from 50 to a 100 feet back therefrom.

It ought to be stated that this ground is very

(Testimony of H. S. McGowan.)

materially changed since pound nets were there. At the time pound nets were located there on what is known as the south end of Oklahoma channel, and since that time they have become sanded up by [239] movements of portions of the Republic spit which moved in there on numerous occasions, so that points where the pound nets were originally located are all throroughly sanded up and does not come to the shore line any more at all. I might say that one pound net was on the shore line and was removed in order to get it away from the seines. I operated a pound net there from about 1892 or '93, to about 1896 or 1897. From 1901 to 1908 no one ever disputed my right to operate seines on the Brumbach seining ground. I have renewed my set net licenses that I obtained in 1908 every year since and I have these renewals with me. They are numbered 1431, 1432 for 1908 and ending March, 1909. The renewal number of 1431 was number 430 dated April 1, 1909, ending March 31, 1910.

These renewal licenses were all, after being identified, offered in evidence, being No. 1431, April 5, 1908, renewal No. 430, April 1, 1909, and renewal No. 668, April 1, 1910. To the introduction of which plaintiff by its attorney objected on the ground that the same were, and each was, immaterial and irrelevant, and particularly as to No. 430 and No. 668 for the same reason.

Whereupon said licenses were received in evidence and marked Defendants' Exhibit No. 13, and the same are hereunto attached so marked.

(Testimony of H. S. McGowan.)

Counsel for defendants then offered in evidence the licenses issued by the Fish Commissioner which had been identified by the witness, being No. 1432, dated April 15, 1908, and renewal number 431, dated April 1, 1909, and renewal number 669, dated April 1, 1910, all set net licenses. To the introduction of which plaintiff by its attorney then and there objected upon the ground that the same is immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence and marked Defendants' Exhibit No. 14, and the same are hereunto attached so marked. [240]

Thereupon counsel for defendants offered in evidence the licenses identified by the said witness, numbers 142, 143, 144 and 145, issued to him by the Master Fish Warden of the State of Oregon under date of June 19, 1909. To the introduction of each of said licenses counsel for plaintiff then and there objected upon the ground that the same are immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence marked Defendants' Exhibit 15, and the same are hereunto attached so marked.

Stipulation [as to Certain Licenses Issued by Fish Commissioner].

It was then admitted by the plaintiff that the Fish Commissioner of the State of Washington issued to the defendant J. P. Coyle set net licenses numbered 1436, 1437 and 1438, under date of April 15, 1908; that the said Fish Commissioner also issued licenses purporting to be renewals of the last three men-

(Testimony of H. S. McGowan.)

tioned licenses under date of April 1, 1909, bearing numbers respectively 435, 711 and 712, and licenses also purporting to be renewals were likewise issued by the same official under date of April 1, 1910, numbered 660, 661 and 662, and the same admission is made to similar licenses issued to defendant Erick Lindstrom, which consist of the original licenses numbered 1433, 1434 and 1435, each bearing date of April 15, 1908, and with the purported renewals thereof numbered respectively 432, 433 and 434, dated April 1, 1909, and the subsequent purported renewals of the last-mentioned licenses bearing date of April 1, 1910, and numbered respectively 658, 659 and 692, licenses being identical in form and covering the same district, the Columbia River district, as the licenses to H. S. McGowan, already introduced. But plaintiff, through its attorney, objected to the introduction of said licenses in evidence upon the ground the same were, and each was, immaterial, irrelevant and not within the issues. [241]

Q. Now, Mr. McGowan, what was the reasonable quantity of fish, salmon, that could be caught in this fishery which you and the other defendants were enjoined from operating in 1908 by reason of the injunction which issued out of this suit?

To this question the plaintiff by its attorney then and there objected upon the ground that it was incompetent, irrelevant and immaterial. And upon the further ground that a court of equity has no authority to assess damages in this suit, and the plaintiff has a constitutional right to a jury trial on

(Testimony of H. S. McGowan.)

matters of damages, if any were suffered, and further, that the witness is incompetent to testify on that question.

A. It would be a very large quantity. I would estimate that from 150 to 200 tons of fish. The average value per ton in 1908 would be about $110 per ton. This could not be very well valued between the three of us defendants on a pro rata basis of the number of nets, for the reason that the lower locations were more valuable than the eastern locations. The locations of mine were adjacent to and easterly from what is known as the "Great Republic" wreck, and that is the best piece of fishery ground in that part of the Columbia River.

Q. What, in your opinion, would have been the reasonable amount of fish, salmon fish, for you to have caught on that ground each year, 1908, 1909 and 1910, during which you have been restrained?

To this question counsel for defendants objected upon the ground that it is immaterial, irrelevant and incompetent, and that the Court had no jurisdiction to assess damages against plaintiff in equity; that the plaintiff was entitled to a jury [242] trial, and that the witness was incompetent.

A. It ought to be easily 50 tons or more per year on my grounds, and I would say that the other territory being more extensive in length might produce about the same amount of fish, about 50 or more tons per year. According to the best of my judgment a reasonable estimate would be 50 tons for each of the three defendants per year. I am talking

(Testimony of H. S. McGowan.)
mostly about Chinook salmon, a certain portion would be what is termed steelheads. They are a fish that are used commercially for canning, mild curing and freezing. The price I have mentioned above would be about the average price for 1908. The average price for 1909 would be about $120 per ton, and the average price for such fish during the year 1910 would be about $130 per ton.

I am familiar with the territory between the mainland on the right bank of the Columbia River and Sand Island. Extending from the north shore of the river west from Fort Columbia along what is termed Chinook beach down past the town of Chinook and for a considerable distance below Chinook, probably a distance of perhaps three miles, and extending diagonally down the stream off the shore over to Sand Island it is a big shoal or tide flats. At mean low tide and fair weather conditions when there is no disturbance in the wind or storms, there is not any navigable water out in that country. There are some pot holes and small sinks, or something of that sort, here and there, and bunches of high sands dotted along, but it is dry and not navigable, partly covered sand and partly mud flats. It is not navigable up and down the river at low tide, not even with a canoe. Nothing that a man could ride in would navigate there. I have never walked continuously out there because it is pretty muddy in places, but I have been over all of the flats from time to time clear [243] out to Sand Island. I have been out there on foot but I have not walked

(Testimony of H. S. McGowan.)

it in continuity from the shore to Sand Island, but have been over different parts of it on foot. The conditions that prevailed in June, 1908, and since that time, generally speaking, there has been a gradual upbuilding of all these flats, I have no means of knowing how rapidly that accretion is forming, only I know it gets gradually more pronounced in most places, getting higher each year in most places. In some spots I have noticed it does not change but a little, in others it changes more. There are fishing traps still in operation in Bakers Bay. Down in the Ilwaco end of the bay there are a number of fish traps still operated and in the territory inside, that is towards the Washington shore and upstream from the eastern end of Sand Island there are a great many fish traps, but there is quite a large section in between these points and located between what might be called the central part of Sand Island and Chinook beach out towards the mouth of Chinook River, where practically all of the original traps were, have been abandoned owing to the shoaling up of the water and the absence of any more fish on these flats. The territory that I have just described as being mud flats or sand flats, nearly all get dry at low tide. There are other traps, however, easterly of Sand Island and just shoreward from the eastern end of the island for a short distance where they do not get dry. I have one or two photographs that I took down there where I could find the greatest amount of water at the particular time I took the pictures. I have a couple I think

(Testimony of H. S. McGowan.)

I took in June, 1908. (Here witness produced two pictures.)

When I took these pictures I was standing on the flats about 1,000 feet to the east and north of the inner side of Sand Island between what is called the Island and the Chinook beach shore. The view of them extended towards the Washington shore. **[244]** This view covers places where there was the most indication of water between Sand Island and the Washington shore. These pictures were taken approximately an hour after the tide indicated as low tide on the tide table. The tide was rising at the time. These pictures were taken, according to the best of my recollection, in June, 1908. I would not be positive as to the exact date, but approximately at that time. I think they were taken between nine o'clock in the morning and half past nine; maybe as late as ten. They were taken at the same time.

Counsel for defendants then offered said photographs just testified to, by said witness, in evidence. To the introduction of the same in evidence counsel for plaintiff then and there objected upon the ground the same are immaterial and irrelevant.

Whereupon said two photographs were received in evidence, marked Defendants' Exhibits 16 and 17 respectively, and are hereunto attached so marked.

(Witness continuing:)

In one of these pictures you will notice a man and a boy, one is my brother and the other is my son.

On the higher part of these tide flats between Sand

(Testimony of H. S. McGowan.)

Island and the Washington shore, generally speaking, there is no vegetation; on the lower part of the flats are the most indications of water, there is water grass growing.

Q. What did you pay for whatever right you acquired from Brumbach?

To this question counsel for plaintiff objected upon the ground that it was immaterial and irrelevant.

A. $2,000, if I remember correctly. The greater part of it was [245] for fishery rights principally; part of it was for a few old horses Brumbach had, and a couple of sailing skiffs, and two old seines.

I built the wharf that I spoke of some time ago; at a point about what might be termed the center of the inner side of Sand Island proper and running down across the tide flats to a sort of hole or part of a sink located there, conveniently where the boats could come in and make a landing when the tide came up. The outer end of the piling was below the line of low tide, in a hole or sink which was then below low tide. There might have been a foot of water there at low tide, and so far as I know that wharf is there yet, and so far as I know the plaintiff may have used it. The plaintiff has been using the building which I built there so far as I know ever since the summer of 1908, that is, since about July, 1908.

I bought other fishing rights down there other than I purchased from Brumbach. I do not remember the year, but I think it was along about 1904. I pur-

(Testimony of H. S. McGowan.)
chased from Reischman Brothers along about 1904, and I also purchased some alleged rights from a man named Graham, I think in 1905. These fishery rights were westerly from the "Great Republic" wreck adjoining what is known as the Brumbach ground on their eastern end and extending in a westerly direction down the shore. These fishery rights would not be in front of the sites in controversy. Those grounds or fishery rights were located mostly, if not all, in front of Site Number One. They may have overlapped Site Number Two on the west end a few hundred feet possibly, perhaps not. I paid $3,000 if I remember correctly, for these rights and I took a bill of sale therefor, but I do not have it with me. I do not know whether the plaintiff knew of that purchase, excepting the Graham purchase I mentioned. The Graham purchase of alleged fishery rights was back on the westerly portion of the Reischman premises. I do not know if the plaintiff knew about the Graham [246] purchase, but R. A. Hawkins, who was a witness in this case on behalf of the plaintiff, was a witness to the bill of sale, and he knew it. I have also bought some fish traps down in the same territory, which were located in the channel that I have spoken of as the Oklahoma channel. These are all sanded up, the most of them, I think. I have a photograph or two here showing some of those traps that sand into the island. At the place shown on these photographs which are now apparently covered with driftwood and debris of one sort or another, this was under water at that time

(Testimony of H. S. McGowan.)

from the point where the piling are to the fore background of the picture. That is all portions, the Peacock spit and the Republic spit that have washed in there between 1890 and 1900. These pictures were taken along in the summer of 1908, I think, and were taken by myself. These properties shown in these photographs were fished in the Oklahoma channel as late as 1898 probably. In the immediate foreground I should think that the sand has been blown up by the wind and washed up by the waves, probably from three to six or eight feet above ordinary high tide, and in the background beyond where the piling appears the sand has been washed and drifted by the winds equally high, probably six or eight feet above mean high tide. In 1898 the channel there had gotten quite shoal excepting in pot holes, which were portions of the old Oklahoma channel, that might have been six or eight feet deep at low tide. When these traps were put in there the deepest water in the channel would run about seven to eleven feet. Within a period of approximately ten years, ten to twelve years, it has shoaled up from about eleven feet to practically nothing, that is as a continuous channel. There are holes in it, but the mouth was completely shoaled up by that time. That is to say, where the surface is five or six feet above high tide in 1898, it was some five or six feet below low tide. That would [247] make a range of approximately fifteen feet. This is a fair illustration of the shoaling up of that portion of the territory, that is, ranging over hundreds of acres, probably running a mile

(Testimony of H. S. McGowan.)

and a half in length, and in places, I guess, a mile and a half in width. The shoaling has not been uniform throughout the entire district by any means. I should estimate roughly, that from 25 to 50 traps have been put out of business by this shoaling process. I know about Sand Island having moved. A good while back, along about 1876, '77 or '78, along in there somewhere, the island was very much to the south or southeast of where it has now grown to be. From that time up to the present the main body of the island had grown in the north a very long way, possibly a mile and a half or two miles. It also became very much elongated to the east, connecting with the Chinook flats for a distance of maybe a mile, or a mile and a half. And I knew where the north ship channel was. Sand Island as it is now located is north of what was the north channel. It has moved right across that channel on the north side of Sand Island. One part of the main bulk of the island ceased moving north along about 1888, I should say, but continued to grow in a northerly direction, adding on and enlarging in the direction of the north and slightly to the east, and some to the west, and later on it had grown considerably to the westward, if portions of Peacock and Republic spits might be termed parts of the island now. And I think the northern end has ceased growing practically and there is a general filling up of the flats between the so-called island and shore. It is navigable over these flats when the tide is up, or high tide. The kind of navigation may be stated to be that fisherman ran

(Testimony of H. S. McGowan.)

their fishboats, flat-boats, gill net boats, and when the tide is up the fish launches run from various places into Chinook and into fish scows that are located around in the neighborhood of Chinook for [248] fish stations, and also to Ilwaco where our cannery is located. There is no regular navigation that passes up and down the river on the north side of the island. There is no navigation there with the exception of one launch that plies on the tide between Ilwaco, Chinook and Astoria. The sort of boats that plies in these waters are all small fish-boats belonging to fishermen or small launches. In the case of this boat which I said plies from Ilwaco to Chinook and Astoria, it is a launch about 50 feet long. I would say there are one or two tow-boats that are operated in towing rafts across out of there at high tide from the Wallicut River, occasionally, not often, and once in awhile from the Chinook River. The ordinary flat-boat used by trappers draws possibly six or eight inches when they are light. Sailing and gill net boats will draw a foot to a foot and a half, and some two feet of water. They are center board boats. The motor fish-boats used by some fishermen there will draw about two feet of water. These fish carrying launches that ply between there when the tide is up, generally draw about four feet of water. Some of them three and some four. These tow-boats do not ply with any regularity on any route but tow logs occasionally from the Wallicut and Chinook rivers to the mills. The Wallicut River has its mouth about a mile and a half in a generally north-

easterly direction from the town of Ilwaco, and the mouth of the Chinook River is about two miles further east than the mouth of the Wallicut. They are really tidal sloughs, not rivers. The loggers haul their logs down into the beds of these streams and at high tide they take them out to a boom for a raft. These logs can be towed only at high tide.

Thereupon counsel for defendants offered in evidence the two last photographs identified by the witness. Counsel for the plaintiff objected to the same upon the ground that each was [249] immaterial, irrelevant and incompetent.

Whereupon said photographs were received in evidence, marked Defendants' Exhibits 18 and 19 respectively, and are hereunto attached so marked.

(Witness continuing:)

There is no navigation that I know of at all passing up and down the river around Sand Island or out through the main mouth of the river from above Sand Island to the mouth of the river below Sand Island, and I would be able to know it if there was. The only boat I know of that goes out through there into the main Columbia from between Fort Canby or Disappointment and Sand Island is the life saving boat which goes out there from Fort Canby life saving station. Of course some fishermen will occasionally get out from there through the breakers, but there is no navigation through there.

I was present at the examination of the two witnesses who testified for plaintiff in this case before the referee on the 15th day of September, 1910, and

(Testimony of H. S. McGowan.)

heard their testimony, I heard what these witnesses said with respect to the ground which myself and co-defendants located with set net licenses, and I heard them make some remark about these grounds being unfit for set net fishing. They are mistaken about it, that is all. They are suitable for set net fishing and I intended in good faith to use them for that purpose, and I would have done so had I not been enjoined in this suit, and I was making all preparations for that purpose and I am able to state that it was a practical way of catching fish at that place with these set nets.

Q. Something was said by the two witnesses to whom you referred as testifying for the plaintiff, that the only evidence of any fishing gear you had out there was a piece of net that was drifting up and down with the current. What are the facts about the installation of your fishing gear, what were you intending to do and planning to do? [250]

A. I had no gear drifting up and down there that I know of. It was intended to be fastened and to fish these locations at favorable portions of the tide, but not to be kept there at all tides, but at tides as were most favorable to fish there. The nets that were being used at that time were two. They were old nets and we were preparing new nets to take their places and to use on other locations.

We employed Walter Bussey and Iver Stensland to take charge of these locations. There was no part of these locations above the line of low tide.

Had I been permitted to fish the locations my en-

(Testimony of H. S. McGowan.)

tire gear and operations would have been located and worked below the line of low tide.

The only reason I ceased to operate there was because I was enjoined by the Court in this action. I had no other reason. Since I have been enjoined, I have done nothing there.

Witness temporarily excused.

[Testimony of G. B. Hegardt, for Defendants (Recalled).]

G. B. HEGARDT a witness on behalf of the plaintiff being recalled, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

(Interrogated by Mr. DORR.)

Q. Do you know, while you were employed by the engineering corps of the War Department, what the attitude of the Department was on the south side of Sand Island with respect to a fairway line or limiting line beyond which stationary fishing gear was not permitted to be constructed or anchored?

Mr. FULTON.—That is objected to as immaterial.

A. Yes, sir. When that line was laid out as a limiting line beyond which no stationary gear could be erected, there was no objection to putting anything inside of the line and conducting **[251]** any operations in fishing.

(Witness continuing:)

The Government or War Department did not require specific permits. They were simply allowed to do as they pleased inside of that line, excepting that the State would grant licenses. I know where this

(Testimony of G. B. Hegardt.)

line was and it was outside of Sand Island, and from the testimony given in this case I would say that the lines were outside of Sand Island. I mean by that such lines did not extend out into the Columbia River any further than Sand Island, and the limiting line was further out in the river than these locations.

Cross-examination of G. B. HEGARDT.

(Interrogated by Mr. FULTON.)

The Government permitted stationary fishing gear south of Sand Island and was never changed to my knowledge. If there was any change in this line I never heard of it. I left there in 1905. I know, of course, that the Government in 1905 or 1906 took charge of Sand Island and excluded everybody from it excepting those to whom it granted licenses. At least, I think that was the object. Prior to 1905, the Government did not care who went there on the island. But in 1905 or 1906 the Government took charge under regulations of the War Department and used it for revenue and leased it out to different parties for seining purposes.

[Testimony of H. S. McGowan, for Defendants.]

(Here Mr. McGOWAN, one of the defendants, interrupted the witness and made the following statement as part of his original testimony.)

I now recall previous to 1905, in 1903 or 1904, the War Department did insist upon people who were using drag seines on the Island getting formal permission to drag their seines between the high and low water near the shore of the island. I think that

(Testimony of H. S. McGowan.)

came out first about 1903 and later on in 1905 it was changed into this formal lease system; that is shown in some of the plaintiff's [252] exhibits at the former hearing. These previous permits or permissions were issued merely in the form of a letter of permission with no consideration attached.

This had nothing to do, however, with this limiting line, and had reference only to the use of Sand Island working on the beach, and it had nothing to do with navigation. This had nothing whatever to do with the fishing rights, but was simply a question of regulating the use of Sand Island itself, that the Government claimed to own. That is as I understood it.

[Testimony of G. B. Hegardt, for Defendants (Recalled).]

Witness G. B. HEGARDT continuing:

Now the object of the permits suggested by Mr. McGowan was preventing conflicts that were often going on on the island between the different parties seining there, but the Government never attempted to issue licenses for fishing, and never exercised any control over the fishing itself or the fisheries there. That was a matter purely for the States and was so recognized by the War Department.

Cross-examination.

(Interrogated by Mr. FULTON.)

During the time I was there, no fish traps were ever constructed or operated in the vicinity of Sites 1, 2 and 3, on Sand Island. The bank was very abrupt there and impossible to use traps there. This

(Testimony of G. B. Hegardt.)

ground was used exclusively for seining purposes, excepting on the south and west end. There were traps in front of Site No. 1, south and westerly. That was a great many years ago; I don't remember. I think there was also a trap in front of Site No. 2, and I think they came inside of this line. I do not know who had them. There were none in front of Site No. 3.

Redirect Examination.

(Interrogated by Mr. DORR.)

There was no objection on the part of the Government to **[253]** locating traps anywhere along on the south side of Sand Island within the limiting line, and this limiting line on the south side of Sand Island is shown on this map that I now have in my hand.

Whereupon, counsel for defendants offered said map in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 20," and the same is hereunto attached, made a part hereof and so marked.

The line that I have referred to as the limiting line is marked on this plat in red ink, as follows: "U. S. Engineer Department, Limiting line, south side Sand Island." I prepared this map. It is a copy of one sent in to the Department from Fort Stevens; it is a copy of an official map, and this line correctly shows the limiting line that was used by the War Department, and that is taken from the official record of the lines established early in 1890. The scale of this map is one ten thousandths. The

(Testimony of G. B. Hegardt.)

shortest distance between the limiting line shown on this map and the line of low water on the south side of Sand Island is 800 feet. The average is over one thousand feet.

Q. Is there any place in front of Site Number Three where the distance is as short as the shortest distance in front of Site Number Two?

A. I may say that that distance referred to as 800 feet is opposite Site Number Two. The shortest distance between the limiting line and the low-water shore line is on the south side of the island in front of Site Number Three, and is one thousand feet, and anywhere within that limiting line the Department made no objection to any kind of gear, fixed, stationary or anything else for fishing purposes. I refer prior to 1905; after 1905, I do not know. **[254]**

[Testimony of H. S. McGowan, for Defendants.] (Recalled).]

H. S. McGOWAN one of the defendants, was recalled by defendants, and testified as follows:

(Interrogated by Mr. DORR.)

Counsel for defendants handed witness a map (Defendants' Exhibit No. 20) and requested him to indicate approximately the set net locations owned by the defendants.

The locations made by myself and the other defendants were as follows:

There were four locations in front of Site No. 2 and four locations in front of Site No. 3. There were none further south than this limiting line, and the

(Testimony of H. S. McGowan.)

eight locations were between the limiting line and the line of low tide.

In reply to your question awhile ago as to whether I had anything further to say, there have been remarks relative to desirable locations out there with reference to Site No. 2. I would say that while we were carrying on our seining operations on Site No. 2, which we designated as the Brumbach fishery, we from time to time removed piling from two fish traps that were located in front of what we termed Site No. 1, because those piling and fish traps interfered with our seining operations. One of the traps was located at that point probably 1200 feet easterly from the "Great Republic" wreck and probably 400 or 500 **[255]** feet westerly from the eastern limit of Site No. 2. The other trap was located at a point 1000 or 1500 feet further to the west but still in front of Site No. 2 and on the beach adjacent.

I fully completed all of our locations. I did not fish there because I was enjoined. I had two old set nets operating there a few days before we were enjoined. I got the permanent location but did not get into permanent fishing operations at all. I had not yet surveyed the locations out. In my judgment the reasonable cost of operating the fishery owned by the defendants in front of these sites would be in the neighborhood of about $30 a day. The active operative season begins there about the first of July and lasts until August 25th, about fifty-five days. It would require some extra time in making preparation, however, to get to work. For that kind of

(Testimony of H. S. McGowan.)

work it would probably—could be done inside of a week, at the most, two weeks. And at the outside I could figure $30 a day for seventy days. This does not include gear, material, boats or paraphernalia, but includes the cost of operating, not the wear and tear of gear or material; that would be more. It would require a set of nets, eight of them, as well as extra nets. It might be necessary to have a complete change of nets, that is, to have sixteen nets instead of eight. It might not be absolutely necessary, but it would be very desirable in case some might be damaged to have the other nets to replace them. Besides nets cannot be kept in the water continuously without rapid deterioration. In regard to the total outside cost of everything, I would say that the labor cost would amount to $30 a day, which would be in the neighborhood of $2,000 or $2,100 for the season. It would require in the neighborhood of $500 worth of webbing that would be used up in the wear and tear probably. It would require lines and rope and other gear to the extent of possibly $150, outside of the nets themselves, **[256]** and it would entail deterioration in the value of the boats used, which might be $100, and it might be essential to employ a special watchman to assist in looking after the nets, which would probably cost $150 additional. I have estimated the cost of anchors with the cost of other gear independent of the nets. The total would run up in the neighborhood of $3,000 for the season. It is practicable to operate that fishery without landing on Sand Island at all. The use of

(Testimony of H. S. McGowan.)

Sand Island there is of special value without the use of the adjacent fishery.

The price that I have mentioned, namely, $3,000 per year, applies to all and each of these three past years, and includes the operation of all the eight set net locations involved in this suit, including the two held by myself and those held by the two defendants. I have treated them all as one fishery. It would be the most economical to operate them together and we had made an arrangement to operate them together.

I was intending to apply these four Oregon licenses on this same territory. The Oregon licenses were not used because of the general understanding that the territory was within Washington. That was common knowledge of everybody, or supposed to be.

The Oregon licenses were procured for this particular location. There was an uncertainty in my mind as to the technical legal status on account of the litigation going on as to the boundary and matters connected with it, and that was a measure of safety. I did that so as to cover it either way in both States, that is to cover the ground.

Cross-examination.

(Interrogated by Mr. G. C. FULTON.)

I purchased these four Oregon licenses as a precaution and I think I purchased them before the decision of the Supreme **[257]** Court was handed down. After that I obtained the Washington

(Testimony of H. S. McGowan.)
licenses for the same places for these same set net locations for each of the years 1909 and 1910. I did not understand at the time I made these purchases of Washington licenses that the Supreme Court of the United States had held Sand Island was in Oregon. I believed that in the final wind up Sand Island would be in the State of Washington. I believed there would be an arrangement between Washington and Oregon that would fix the boundary south of Sand Island, as a matter of comity between the two States, if for no other reason. I did not think Oregon had anything to give up. My belief was taking all the decision together, that the decision itself could not be made consistent, and I believed that the effect of the opinion must be that Sand Island would be in the State of Washington. That was my construction of the opinion, because it could not be made consistent otherwise. The opinion is absolutely contradictory in its terms, and I construed Sand Island as it stands there to-day is in the State of Washington. And that is my understanding of the opinion of the Supreme Court. But that was not the reason why I obtained no further licenses from the State of Oregon. The reason was simply that I had been enjoined by the Court from proceeding any further, and I did not proceed any further, and that was the only reason. I understood that by obtaining licenses from the State of Oregon to operate these set net grounds I would be violating the injunction, that is, I did not know but what I would. It is true that I obtained from the Fish Com-

(Testimony of H. S. McGowan.)

missioner of the State of Washington set net licenses for the same grounds for the succeeding two years, but the conditions are altogether different. It is true the suit was brought in the State of Washington, but, as I say, conditions were different. The different conditions are that the Washington statute provides for renewal licenses and the Oregon statute, so **[258]** far as I know, does not. I thought I had a right to renew these licenses regardless of the litigation.

(Here counsel for the plaintiff demanded that the witness produce the statutes of the State of Washington providing for the renewal of such licenses, but the same was not produced. Counsel for the plaintiff then handed to the witness the Session Laws of the State of Washington for 1905, and asked the witness to examine the same and point out the statute authorizing the renewal of Columbia River licenses.)

(Witness continuing:)

A. I do not find what you are discussing.

Q. Your attorney pointed it out. Now the fact is that that refers only to Puget Sound. I will leave the matter of the law of renewals to your attorneys and let them find out. This book I am referring to and handed to the witness by Mr. Dorr and marked under Section 2, Chapter 139, refers only to Puget Sound.

A. I know it has always been the practice down on the Columbia River. The Fish Commissioner has so issued the licenses.

Referring to the Brumbach purchase, I do not wish

(Testimony of H. S. McGowan.)

to be understood as saying we bought any frontage but the fishing rights not on the island but in front of the island. I did not buy any rights on the island. I understood that the Government of the United States claimed the island and were the only ones who were making active claim at the time, and my purchase was of the fishing rights in front of Sand Island and I claim nothing by that transfer of any shore rights. What I do claim under that purchase is that I am entitled to whatever they are good for which is not yet taken. I knew that Brumbach had no title to any shore land or anything beneath the water or on top of the water other than the license might have given him, and I understood **[259]** the same in regard to the Reischman ground and also the Graham ground. The wharf that I constructed was not on the south shore of the island, but on the inshore and nearly a mile from the ground. The nearest point, I suppose, would be something over half a mile across Sand Island. Both Brumbach, Reischman and Graham had employed the ground that I had purchased from them exclusively for seining purposes, although I am not sure about Graham; I don't know whether Graham ever really seined there. There were some old trap piling on the Graham premises; they were not being used at that time. After I acquired the bill of sale from Brumbach and Son I fished the ground included in his right, whatever that was. It extended from a point about 400 feet westerly of the east end of Site No. 2. I think I began fishing there in 1902, and I fished it

(Testimony of H. S. McGowan.)

in 1903, 4, 5, 6, and 7, I believe. The licenses were in the name, I think, of McGowan Brothers. I did not rent the ground in 1905 from the Government. I never did rent it from the Government; 1905, I think, was the first year the Government put the leases for what they termed Sand Island sites up for auction or rental, or to the highest bidder, and at that time what is termed Site No. 2 was bid in by Stensland, who was the highest bidder. He was a fisherman and was not in my employ. His son was, or one or two of them were in my employ afterwards. He got the bid on his own ground, that is, Site No. 2. The Stensland boys and Stensland himself had long years previously acquired an interest in what is known as the Reischman grounds, in fact their interest was approximately a half interest, and the interest we bought from Reischman being the other interest. They were joint users of that territory and we bought Reischman's rights, but we did not buy Stensland's rights, and that locality was largely on Site No. 1. Possibly a little overlapping on the west end of **[260]** Site No. 2. Stensland had bought all of Site No. 2 and I made an arrangement with Stensland after he bid in that, for about 1400 feet of that site easterly from the "Republic" wreck, that I wished to use the same that I had been using the Brumbach ground, and the Stensland boys were using the other adjoining on the east. There was some 3,500 feet space and I think about several hundred feet of the boundary of Site No. 2 is what is called the "old Republic" wreck. According to our

(Testimony of H. S. McGowan.)

arrangements I took from the wreck eastward including about 1,400 feet. I think we were using about half of it and Stenslands were using the other half. My half was in the middle and I was to pay them a certain amount in proportion of the cost of it. I think we paid in the neighborhood of $1,100. Their rental, I think, might have been fifteen or $1,600 per year. I subleased from Stensland at $1,100 per year. I think that lease was reduced to writing.

(Here counsel for plaintiff demanded that the witness produce such lease to be used in evidence in this case.)

(Witness continuing:)

I don't remember whether it was reduced to writing, but I do not have it here.

During all the years that I fished these grounds from 1902 to 1907 inclusive, seines were used exclusively. I do not recollect the number of fish we caught in 1902. I suppose we got about 100 tons, or thereabouts; I do not now remember. I do not recall how many we caught in 1903. My general recollection is that the catch was increasing and had increased right along. The grounds were getting in better condition all the time. The average catch of fish there on Site No. 2 during all the years that I had it I think would run from probably—I am talking of the Brumbach ground, that particular place it would run 90 to 160 or 170 tons on what is understood as the Brumbach grounds. This is [261] not practically in Site No. 2. There was several hundred feet of

(Testimony of H. S. McGowan.)

Site No. 2 easterly of the Brumbach ground which was occupied by Stensland. We actively operated two seines. We had other extra seines. Stensland occupied two seines and at times one or two below the wreck of the "Republic." We employed in operating these two seines, I think, a crew of sixteen men, and a cook extra, making an entire crew of seventeen men. We had sometimes eight and seven and one season we had ten horses. We did not use any launches, of course we did sometimes, but as a rule we did not. Our daily expense of operating the entire crew would average in the neighborhood of $70. We paid our men then by the day; we paid them $2.50 a day. I do not know what we paid in 1907. I think we employed them one *of* two seasons at $2.00 or $2.50 a day, and four bits a ton on the tonnage that they caught. I think it was $2.00 a day and four bits a ton. Each man got four bits for every ton of fish caught. The average rental of horses was from 30 to 45 or 50 cents a day. The usual price I think was about $4.00 a day for a team and driver that went with them, together with their keep and the keep of the driver. We furnished board and lodging for all of our employees in addition to their pay.

I bid on this Site No. 2 at the time the Government advertised to receive bids in 1908. I did that to avoid litigation if I could. I do not remember if I bid for Site No. 3 or not, but I bid on Site No. 2 and was an unsuccessful bidder. The Columbia River Packers' Association bid more than I did. The bids, I think, were opened that year sometime prior to

(Testimony of H. S. McGowan.)

May first, 1908, and at the time the bids were opened I knew that the Columbia River Packers' Association was the successful bidder for these two sites and I knew that they bid in these two sites to get my fishery away from me, and I knew that they intended to employ it in hauling seines. Of course I was disappointed to find out that there was an entanglement as to claims and interests down there when I [262] discovered that the Columbia River Packers' Association had outbid me. I did not conceive the idea of corking them. I conceived the idea of desiring to protect my property rights and my idea was simply to protect my property rights, and it was with this idea in view that I obtained the set-net licenses and put in set nets, that is to carry on my fishery there. Had I been a successful bidder for the site I probably would have employed the ground the same as I had previously employed it, that is in seining and I would have done so, I guess.

There were a number of bidders for these seining sites but I do not remember who they were. My understanding was that the lands that were bid in by the successful bidder would be employed for seining purposes. I do not remember the amount of my bid, but it might have been in the neighborhood of a $1,000. I do not know whether Stensland Brothers bid for either of these sites or not, and it is possible that I may have signed their bond for their bid. I know they were interested and they had in mind bidding and may have made a bid, but I am not entirely clear as to that. I thought I was dealing fairly with

(Testimony of H. S. McGowan.)

the Stensland Brothers in attempting to overbid them when the property was offered for lease, for I intended to be perfectly square with them. I never would have bid in their ground and then taken it away from them. I understood that they had an equity down there, that is my feeling of equity. They had put in work and money down there and had fished in that country and there is a general feeling here among fishermen who are not trying to beat each other, that one man's rights ought to be recognized by another, whether they are legally enforceable or not.

(G. C. FULTON, Counsel for Plaintiff.)

Q. The public records showed at that time (1905) to the Columbia River Packers' Association and to the world, that Stensland Brothers had leased Site No. 2 from the Government?

A. That was in 1905. [263]

Q. In 1907, that is they leased it in 1905 but for three years, and the public record showed that, so that when it was offered for bid again we find you a bidder for it and the Columbia River Packers' Association a bidder for it and the Stensland Brothers?

A. And there might have been others too.

Q. Quite a number of people bid for it. Now if anyone had a right to put out a set net in front of this property, it would not be worth ten cents for seining grounds, would it?

A. I don't think it would.

Q. If Stensland Brothers had been successful in their bid and said to you, "We will charge you a little

more than you can afford to pay this year," then you would have a right, according to your theory, to put a lot of set nets out in front of it and absolutely destroy whatever right the Government leased to them.

A. I would not destroy any of their rights because they did not get any. According to my contention I would still have a right to go in front.

Q. Why didn't you put out set nets in front of Site No. 3 in 1905 to 1908?

A. Because I didn't, that was all.

Q. Do you know any reason why you did not?

A. No particular reason, excepting that I didn't want to.

Q. You don't claim that the Columbia River Packers' Association in its leasing from the Government Site No. 3 trespassed upon any of your supposed rights?

A. They did certainly, when they began to operate there.

Q. As to Site No. 3? A. Sure.

Q. I understand you claim you never acquired any of Site No. 3 and did not fish it in 1905, 1906 and 1907? [264]

A. No, I did not operate on Site No. 3 those three years.

Q. You had no interest in Site No. 3 in 1905, 1906 and 1907? A. No.

Q. So that when the Columbia River Packers' Association was the successful bidder for Site Number Three, they did not trespass upon or acquire any fishery rights belonging to you or claimed to belong to

(Testimony of H. S. McGowan.)

you? A. That I had had previously, no.

Q. Then what excuse had you for putting those set nets in front of Site Number Three?

A. I did not have any excuse; I simply had a right; I was exercising my right.

Q. You stated awhile ago as I understood, that the reason you put these set nets in front of Site Number Two was to protect your fishery rights?

A. Yes, that is correct.

Q. Now what reason did you have, if not an excuse, for placing set nets in front of Site Number Three when you knew the Columbia River Packers' Association when it leased this ground from the Government intended to employ it as a seining ground; what reason had you for placing set nets in front of Site Number Three under those circumstances?

A. Because I had a right to and wanted to use it as a fishery; they did not lease any fishery. I did not do anything to the shore line; they leased the shore.

Q. That is your only reason?

A. That was the facts.

Q. That was your only reason?

A. Surely that was my only reason. I wanted to run a fishery there.

Q. You made a rather broad statement awhile ago that you did not consider that the Columbia River Packers' Association [265] was fair in making a bid that was more than you people bid for Site Number Two, because they did not protect your equity, or something substantially to that effect?

A. Well my meaning was that I believed their pur-

(Testimony of H. S. McGowan.)

pose was to go down there and take my fishing rights without consulting me whatever, and I think they did do that.

Q. And you thought that was wrong?

A. Yes, of course I did.

Q. But you still thought you were perfectly right and justified to go upon absolutely new ground in which you had no equity and by placing these alleged set net locations in front of it absolutely prohibit the Columbia River Packers' Association from employing that ground?

A. They simply made war on me and I protected myself the best I could by exercising my rights.

Q. Then you were not telling the truth awhile ago when you said that your only reason for putting set nets in front of Site Number Three was because you wanted to?

A. No, I said to exercise my right of fishery.

Q. You said that was the only reason and now you say the reason was that they declared war on you and you proposed to carry the war to them.

A. That was one branch of the case.

Q. And didn't I ask you if that was the only reason and you said it was? A. No, I think not.

Q. You think that is the statement? A. Yes.

Q. You made the mistake then?

A. Well, I did not put the question, and you put it that way.

Q. Now I understand that because the Columbia River Packers' [266] Association was the successful bidder for Site Number Two, on which you

(Testimony of H. S. McGowan.)

claimed you had a fishery right, you put these set nets in front of Site Number Three in order to carry the war into their territory?

A. That was merely one branch of the case.

Q. What was the nature of your fishery right on Site Number Two?

A. The nature of it was the purchase from the owner who had it before we had it.

Q. That was a seining right?

A. Fishery right; I could use it for any legal fishing I felt disposed.

Q. A fishery right, you say?

A. A right of fishery. At that time it was held under seining licenses.

Q. And thereupon the only right of fishery would be a seining right, because that would be the only one exercised; therefore it would be the only right he had?

A. That was the only right he had, in just those terms, yes.

Q. If he had any right at all it was a possessory right that was recognized by fair-minded people?

A. Oh, no, it was a legal fishery right he had.

Q. It was a seining right, that is all?

A. He could use it for other purposes.

Q. That is, he could?

A. Mr. Brumbach, yes.

Q. Nobody else could, could they?

A. Nobody could use it for any kind of fishery without his consent.

Q. That is the idea exactly; and thereupon the

(Testimony of H. S. McGowan.)

right, however that he had acquired, if any, was by virtue of employing it as seining grounds? [267]

A. Yes.

Q. And that was a right of fishery that he had, and incident to that he alone could employ it for set nets if he desired. A. Yes, sir, as I understand it.

Q. Stensland got that from the Government, didn't he, subsequently and you acquiesced?

A. No, they got their rights originally by locating.

Q. They subsequently, in 1905, acquired a lease from the Government and continued that same right precisely as Brumbach had continued it?

A. They got a right to use the shore. They did not get a fishery right from the Government.

Q. They did use the shore, continuing any right Brumbach had?

A. No, they did not continue rights on the Brumbach ground proper, excepting part of what is termed the Brumbach ground westerly of the "Great Republic."

Q. They got part of it and leased it to you?

A. They leased a portion of the use of the shore to me.

Q. And you are lawyer enough to know that whenever you accept a lease from a party, you are not in position to deny his title?

A. That is true; I did not deny his title to the use of the shore.

Q. It was his fishery right, wasn't it?

A. No, he had no fishery right on Brumbach ground.

Q. Still, out of the generosity of your heart, you

(Testimony of H. S. McGowan.)

paid him eleven hundred dollars a year for a right that he got for nothing?

A. I did that merely to avoid litigation.

Q. In order to buy your peace? [268]

A. Practically to buy peace.

Q. Nothing else; you paid him that for three years to buy your peace?

A. Practically so; that is about the size of it.

Q. Now since you are frank enough to admit that you put these set nets in there simply as a war measure I presume that you won't contend very seriously that they are of any very large value?

A. I certainly do; I don't say that they were merely and simply a war measure; that is just one branch of it.

Q. But you insist that they are of great value?

A. They are of great value, yes, sir.

(Witness continuing:)

A set net is a long or short dip according to local circumstances. It may be made out of cotton or linen; they are usually made out of linen. I do not know of any instance where a Columbia River gill net was made out of cotton. The size of the set nets and gill nets run from 5½ meshes up to 11. On the lower Columbia River, that is below Cathlamet, I don't know that they use a mesh smaller than six or seven inches; maybe as low as six and a half. The spring fish will run from seven to eleven inches in gill nets. In a general way a set net is constructed like a gill net. They have a line strung with corks known as floats and a lead line on the other side. If you hang

(Testimony of H. S. McGowan.)

a net too taut of course you won't gill your fish. If you hang it loose, it don't make any difference how swift the water is, it will hang loose. In the operation of set nets they are generally fastened at each end. Not necessarily, however, both the cork and lead line, but it must have some weight on each line. In front of Sand Island a good part of the flood tide and a good part of the ebb tide is dead water; dead water probably about half of the time. The current is so slack [269] that it is not difficult to hold against it and there is practically no current there for about half of the time, not enough to interfere with operations. You might operate a set net there all of the time but they would not fish successfully when the current was too strong, simply because as a matter of course when the current is too strong no nets will fish to the best advantage. A gill net will operate successfully in any water, clear, as well as muddy, in the daytime. In the operation of set nets we operate them practically half of the time, that is successfully. You can operate a set net successfully for about twelve hours a day, but a seine only about five hours in twenty-four. Sometimes they are run on a short tide and not be actually fishing more than three hours. Sometimes five or six or seven in twenty-four hours. The average time in which seines can be operated successfully is five to six hours per day. They are working a good deal longer but that is about the time the nets are actually working in the water, while set nets can be successfully worked there twelve hours in each twenty-four.

(Testimony of H. S. McGowan.)

(G. C. FULTON, Counsel for Plaintiff.)

Q. Don't you think you were very foolish and exercised very foolish judgment in operating seines on Site Number Two and the gentlemen who operated seines on Site Number Three exercised very poor business judgment, when he could have got more fish with set nets at one-third the cost?

A. It may have been; I don't know.

Q. During all these years of fishing on Sand Island at a very large expense of seining, they would have done better by using these measly little set nets?

A. I know they could have caught more fish and done a more profitable business by other means than drag seines.

Q. But I am talking about set nets compared with seines.

A. That may be true; it is a matter of opinion.

Q. Did you ever know of operating set nets in the vicinity of [270] where your set nets were proposed to be operated? A. No, I do not.

Q. How many practical fishermen resided in that vicinity and are familiar with Sand Island and its environments?

A. Well, I should think a good percentage of the population in that neighborhood are fishermen of one kind or another.

Q. All of them have had many years of practical experience in the fishing industry?

A. A good many have and some have not.

Q. And no set net has ever been established to your knowledge on the south side of Sand Island?

(Testimony of H. S. McGowan.)

A. I don't know as to that; I haven't become familiar with them there. They use seines and traps and gill nets.

Q. A trap will fish better in clear water than in muddy water? A. Yes.

Q. A seine will fish better in clear water?

A. Generally speaking it will; there are some exceptions.

Q. The reason of that is that the fish can see the lead of the trap and won't go against it but follow it up and get into the pot? A. Yes.

Q. And they can see the seine and will follow it along and ultimately get pocketed?

A. They may or they may fly the seine entirely.

Q. Whereas if it is muddy they will turn and get off? A. They are apt to.

Q. While with the gill net, if it is clear, they will lead right away from it?

A. It depends on the degree of clearness.

Q. Well, if they can see it?

A. It also depends on the local conditions, small breakers and so forth—a gill net may work well in clear water.

Q. The south part of Sand Island has been seined continuously, [271] that is the grounds included within the Sites Numbers Two, Three and Four, by seines for practically ten or fifteen years last past?

A. Yes, I should think they had.

Q. You have been interested yourself down there for pretty nearly twenty years?

A. That is with traps and seines. We did not do

(Testimony of H. S. McGowan.)

any seining until 1902.

Q. And you have made it a point to keep yourself familiar with the fishing industry on the Columbia River naturally? A. Fairly so.

Q. That is your life business, isn't it?

A. Yes, with the exception of when I am tangled up with a boom.

Q. That you say is a side issue? A. Oh, yes.

Q. And you have kept yourself familiar with the different seining outfits along the river, and where they are seining and about how much fish is caught, as nearly as fair business dealing will permit?

A. Well, I generally try to keep up with the current of affairs.

Q. You try to keep up with the procession?

A. Yes.

Q. And you have known naturally how long these grounds covered by these sites I have mentioned have been employed for seining purposes, have you not?

A. In a general way, yes.

Q. For about how long?

A. Site Number Two or the part called the old Brumbach ground has been used since about 1900 or 1901 for seining purposes, and Site Number Three I think perhaps was used a little longer than Site Number Two, but they have not always been used for seining, but partly for traps at one time. [272]

(Witness continuing:)

A good while ago there were one or two traps built in front of Site Number Three. It must have been as far back as 1896, or thereabouts. The principal

reason they quit, I think, was because they were harassed a good deal by gill net fishermen and preferred to carry on seining rather than be harassed by gill net fishermen.

A. I mean that there was a lawless bunch of gill netters backed up by certain agitators in the Union and outside of the Union who were against all kinds of fishing on the Columbia River except gill netting, and they were particularly antagonistic to all kinds of fixed gear and particularly traps, and they made it their business to make life a burden to trap fishermen as far as they could and particularly in places that were peculiarly exposed to their incursions, and that locality down there being the best fishery in the lower Columbia, that is that neighborhood, the gill net fishermen naturally congregated there, especially at certain parts of the time, and it was an easy matter for them to make raids on the trap fishermen and raise the dickens with them and they did do it.

Q. You mean they pulled the traps out?

A. No, sir, they used to come in and assault the men on the pile drivers and threaten to hang them. They never pulled any traps out that I know of. They pulled some pile drivers loose at one time and may have cut some off but I don't know of pulling any piles except in this one place.

Q. The space occupied by fish traps, on Site Number Three, is right in the fairway ground to gill netters?

A. No, the gill netters carry on their fishing further off [273] shore. Of course some drop their

(Testimony of H. S. McGowan.)

nets in along the beach sometimes, but the bulk of the fishing is done further off shore.

Q. On this day that you and Mr. Bagnall, assistant to the engineering department of the United States, went down to visit these set nets, the gill netters were outside of their ordinary drift?

A. They were where they usually fish.

Q. And that was so close in you could not see the set nets; you could not get to the set nets?

A. No, the gill netters were out in the stream.

Q. How much did the boat draw?

A. I would say from her looks, 8 or 9 feet of water.

Q. These buoys you say were in 8 or 9 feet?

A. The inner shore buoys were in about 4 or 5 feet, and the off shore buoys were probably in from 8 to 15 feet of water.

Q. And that is at low tide, too?

A. But you know boats are not anxious to ground down there where that swell is and they keep well off shore.

Q. There was 15 feet of water there at low tide and you would not say that a boat that drew only that much would be afraid to go in fifteen feet of water?

A. If all the conditions were favorable, but not down there, because they are not favorable.

Q. But you stated that the boat went away and left on account of the nets closing around?

A. No, I said she went away finally because he ended his view of the situation and the gill nets were drifting in by the tide and congregating thicker

around the boat and to avoid being entangled he got out.

Q. So you say now that a trap built in front of Site Number [274] Three, three hundred feet from the shore, would not be in the regular drifting ground used and employed by the gill net fishermen?

A. It would be probably where some drift at times.

Q. I am talking about where they habitually drift, the gill netters.

A. The proper drifting ground is further out, although some drift right in; I have seen them throw their nets onto the beach.

Q. As a matter of fact, when you are seining, you are bothered more or less with gill net fishermen drifting down in front?

A. Oh, yes, it is quite an annoyance frequently.

Q. And these buoys you put out would interfere with the gill net fishermen to a large extent, wouldn't they?

A. If they drifted into them, they might get entangled.

Q. How far were your outside buoys from the shore?

A. Well I could not say exactly, I presume 300 or 400 feet, maybe.

Q. You remember now that you testified that your inside buoys were 50 and 100 feet from shore?

A. That was merely an estimate.

Q. But you say your set net would be only about 100 feet long?

A. Oh, no, probably three to four hundred feet off

(Testimony of H. S. McGowan.)

the beach, the ouside buoys.

Q. How long did you propose constructing the set net? A. Probably 50 to 60 fathoms.

Q. That is about 300 or 340 feet?

A. In that neighborhood.

Q. So that if your inside buoy was 100 feet from shore, your outside buoy would be in the neighborhood of 400 feet at least from the shore? [275]

A. That would be about it.

Q. That is about as far out as these traps extended, isn't it?

A. The traps used to go out anywhere from 300 to 500 or 600 feet.

Q. So you would have met with the same trouble had you continued the operation of these set nets that the former gentlemen encountered when they attempted to operate traps?

A. Our gill net friends are a little changed at heart now from what they were in those early days.

Q. That is a fact, is it?

A. It is a fact that they are not so destructive as they used to be.

Q. Is not that because they put the traps out of the way from annoying them?

A. In a certain sense, but not absolutely. They destroyed our traps below Fort Columbia and above Fort Columbia in 1884 and we reconstructed them and used them ever since and they never have destroyed them since.

Q. Now, to be just absolutely honest, don't you know that the reason why the traps have not been

built south of Sand Island in front of these sites is simply because the fishermen would not allow them to be there?

A. No, that is not true, but it is true that we fishermen generally feel that the gill net fishermen would annoy them. To what extent, whether to the extent of tearing out the traps, I do not know.

Q. They would assault them and harass them as you have stated to such an extent that they could not maintain the trap there?

A. No, sir, that is not true. They did the same thing in Oklahoma but the fishermen maintained the traps and continued to. [276]

Q. That is the reason that people don't build traps?

A. That is not the only reason.

Q. That is one of the considerations? A. Yes.

Q. Isn't that the best trap ground in Oregon?

A. I guess possibly it is, as good as any. I do not think there are any good trap grounds in Oregon.

Q. Well, you can call them in Washington. As good as any on the Columbia River?

A. Yes, maybe.

Q. Then why don't the people put traps in there?

A. Because they were using it for other means.

Q. Trapping is not half as expensive as seining?

A. Generally speaking it is not.

Q. For what reason do they expend twice as much money fishing by seines when by spending one-half as much they could fish it equally as well with traps?

A. As I said before the troubles with the fishermen was the element in the first instance, and they got in

(Testimony of H. S. McGowan.)

the habit of using seines instead of traps, and it has probably continued, not altogether for the reason that it is more profitable to seine, but it is the system they got into and people are apt to follow a system for a certain time before they change.

Q. Don't you think you would be somewhat annoyed and harassed if you had maintained those buoys out 400 feet? A. That may be.

(Witness continuing:)

The law allows gill netting to begin on the first day of May of each year and generally it does not become profitable for and average fisherman to begin until along late in June, or some time in June. When I operated seines on Site Number Two they [277] varied somewhat in length. We had seines as short as 180 fathoms and some as long as 260 fathoms. I think the seines running from 200 to 210 fathoms were used more than any other seines. The difference in the cost of a seine and a gill net depends upon the size. Take a good, first-class average seine and a good, first-class average gill net, I suppose the seine would be somewhat cheaper. The gill net of standard depth draws 25 or 26 feet of water. Everything brand new would cost, I suppose, about seventy-five cents a fathom, and a seine of similar depth would probably cost—well, I don't think there would be much difference. In order to have operated these set nets of mine I think it would take about eight men.

I think it would take eight men to operate the nets themselves. I think it would average about a net to a man, by operating them altogether it would take

about a man to a net. One man alone could not operate one single net by himself with as good advantage as two men with two nets contiguous. But I think it would require eight men to handle these eight set nets. In addition to that you would nave to have nets and gears and boats, and you would probably have to have a small launch to make it convenient and profitable. The object of that would be that you cannot have eight men all working at one job in the most economical way and have them away from home where they would have to come miles and miles to get supplies, and the kind you get that they would constantly use to prepare fish for market. This also, of course, applies to seining as well as gill netting. When we operated seines on those grounds we did not use a launch, the only launch was the cannery launch that took the fish away and brought our supplies. They came on the regular cannery company launch and the outfit had two wagons part of the time and horses that they used for seining. You can operate two seines, one 1,200 feet long by employing seventeen men at $70 a day, or around that sum. I [278] do not think you could employ eight men for $30 a day. I said eight men were the only expense and figuring a launch with one extra man figured at $6 a day. I made the contract with eight men for the season. We would get our provisions from the cannery. Generally speaking, it would cost about $80 a day to operate two seines 1,200 feet long on Sand Island, and would cost about that in 1905, '6 and '7.

Mr. FULTON.—Q. When you obtained these Ore-

(Testimony of H. S. McGowan.)

gon set net licenses, did you post any notice on the bank or shore of Sand Island? A. No, sir.

Q. Did you post the number of either of those licenses on the shore? A. No, sir.

Q. You did nothing under those licenses whatever excepting to hold them?

A. The only thing I did was to make the preparations to put licenses out on the location ground, and then the injunction came out and I quit.

Q. You intended to put them on the ground?

A. I intended to establish them out there, providing it was necessary to protect my rights.

Q. You intended to put the number on the ground?

A. I would if I found it was necessary.

Q. You had not yet found it so? A. No.

(Witness continuing:)

The only notice I gave or the notice as posted were the numbers of our Washington licenses on the buoys, and also on the bank, accordingly as I have heretofore testified. I do not recollect whether I put the Washington license numbers up before or after I knew who was the successful bidder for these sites. [279] But I apprehend it was very shortly after the issuance of the licenses, April 1, 1908. I would probably receive these licenses a couple of days after they were dated and would require a day or so to put up the notices. I presume several days at least might have elapsed after the date of the licenses until I put up the notices; that is, the Washington notices. My recollection is I posted the notices as

promptly as possible after I received them, and in the same manner as I had previously done.

[Testimony of G. B. Hegardt, for Defendants (Recalled).]

G. B. HEGARDT, being again recalled by counsel for defendants, testified in response to interrogatories propounded by counsel for defendants as follows:

(Interrogated by Mr. DORR:)

The Oklahoma channel referred to in the testimony herein runs in the north and west direction and follows the Republic spit on the west side of Sand Island and the southwest corner of Sand Island. Republic spit is shown on this chart, Defendants' Exhibit 5, as being attached to Sand Island. That portion of the channel that laid between Republic spit and Sand Island proper was what has been referred to as Oklahoma and Oklahoma channel. That channel is not there now; it has shoaled up, filled in. Referring to Defendants' Exhibit 5, a chart upon which I have delineated certain lines, these soundings were taken in 1896 and [280] covers practically the territory north of Sand Island lying between Sand Island and the Washington shore; that covers a large expanse of flats and that portion of this chart referred to in the footnotes as being from the survey of the United States Engineers, 1907, covers only the bar proper, the territory lying between the Oregon shore and Sand Island and continued up to Sand Island as far as Fort Stevens. In the footnote it says: "Topography executed between 1868 and 1892,

(Testimony of G. B. Hegardt.)

and hydrography between 1868 and 1899." That means the general survey of this chart was made in 1868 from the Pacific Ocean, taking in the Lewis & Clark River and the Columbia River estuary on the Washington side to Knappton. The process is that the United States Coast Geodetic Survey corrects all information received and puts on the date when received. Since 1868 no survey has been made of the Lewis & Clark River or Youngs River or Youngs Bay. The soundings taken in Bakers Bay were on the survey in 1896, and this footnote states that the "Hydrography was executed between 1868 and 1899." The 1899 soundings were taken from Astoria and east in connection with the bounds of the river above Astoria, but the main channel from Fort Stevens west and out to the Pacific Ocean were taken in 1907, and no survey was made of Bakers Bay since 1896; so that the soundings and depth of water represented on the map in Bakers Bay are of 1896. But generally what we call the annual bar survey only covers territory from Fort Stevens and west to the Pacific Ocean. The first and immediate effect of the jetty on the water at the bar was to sweep away what is called the middle sands located at the mouth of the river which divided the entrance to the river into two channels, north and south, and one channel was formed which has ever since remained. The middle sands at the time the construction of the jetty began was about eight or nine feet at low water. These sands have been swept away and the depth of water at that point is now from 24 to 35 to 40 feet deep.

(Testimony of G. B. Hegardt.)

This map, Defendants' Exhibit 5, does [281] not delineate Sand Island as existing from an actual survey made in 1896. The custom has been to make a complete survey of Sand Island for every annual report and survey, while the territory of Bakers Bay has not been sounded. That was to keep track of the movement of Sand Island and also for the purpose of checking the cross-sections of the river between Sand Island and the jetty. So that Sand Island has always been surveyed every year for that purpose. These dotted lines surrounding Sand Island represent the limiting lines by the engineers in the early nineties; that provided a clear way or passage in which no traps or gear could be constructed. They could not be constructed within the limiting lines; that is between the limiting lines or channel lines that defines the channel. I refer to those lines in Bakers' Bay and those lines were established for the purpose of providing an unobstructed channel from the Columbia River at the head of Sand Island and Ilwaco and Fort Canby, and between those limiting lines defining the channel no obstruction could be placed. That is, no obstruction could be placed outside of those dotted lines surrounding Sand Island.

Sand Island is delineated on this map, Defendants' Exhibit 5, according to a survey thereof made in 1907. The blue line marked "boundary line as claimed by the State of Oregon" as delineated on this map was taken from the map put in evidence by the State of Oregon in the suit brought by the State of Washington against the State of Oregon to establish the

(Testimony of G. B. Hegardt.)

boundary line between the two States in that vicinity.

Redirect Examination.

Q. These section lines extending over this territory cover Sand Island and the main channel (Defendants' Exhibit 5) I understand have simply been placed on this plat. They do not represent actual land surveys? [282]

A. No. There was no survey covering Sand Island.

[Testimony of J. P. Coyle, for Defendants.]

J. P. COYLE, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him by counsel for defendants, as follows:

(Interrogated by Mr. DORR:)

My name is J. P. Coyle. I am one of the defendants in this action. I reside at McGowan, Washington, and have lived there about fourteen years. I am the same J. P. Coyle who held the three fishing licenses for set nets issued by the State of Washington on or about April 15, 1908, which were referred to by Mr. McGowan in his evidence. I am a fisherman by occupation and have followed that calling for about twenty-three years on the Columbia River. I have been engaged in trap fishing and seining for salmon fish on the lower Columbia River. I know the territory or character of the land commonly called Sand Island, and have been acquainted with it since 1903. I fished there in 1903; I never knew the island before that and had never seen it. In 1903 I seined

(Testimony of J. P. Coyle.)

for a seining outfit by the name of Goodnough & Lindberg. I know in a general way the location of the so-called sites numbered two and three on the south side of Sand Island and know where the boundary lines are on the ground.

Q. What did you do if anything towards making locations under the three set net licenses which you held in 1908? A. I put down anchors and buoys.

Q. Whereabouts?

A. I put down the inner anchor about five feet from the shore line at low water.

Q. Above or below?

A. Below; out towards south channel and made it fast with lock and chain and wire cable; a wooden buoy with a number [283] attached, one for each set net, one inside and one outside.

Q. How many to each location?

A. Two buoys to each location.

Q. One on either side? A. One on either side.

Q. Where was the outer end of each location with respect to the shore line, further in or further out?

A. It was three hundred or thereabouts from the inner buoy out south.

Q. How were these buoys marked, if at all?

A. Marked with large letters on a wooden board, with a light or white background, and black letters.

Q. What were the letters?

A. They were numbers, about six or seven inches long.

Q. What were the numbers; what did they repre-

(Testimony of J. P. Coyle.)

sent? A. They represent the location for a set net.

Q. What connection if any did the number of the licenses have with the number of your buoys?

A. You had to put your number on the buoy in order to establish that you intended that for a set net location.

Q. Did you put the same number that your licenses carried on your board? A. Yes.

Q. How many locations did you so establish or locate? A. Three.

Q. Who was out there with you at this time if anyone? A. Mr. Lindstrom and Mr. McGowan.

Q. Mr. Lindstrom is the other defendant?

A. Yes, he and I placed the anchors.

Q. Henry McGowan, likewise the defendant in this suit? A. Yes, sir.

Q. You were all there together; do you remember the day? [284] A. I think it was in June.

Q. You don't remember the exact day of the month? A. I think about the middle of the month.

Q. How soon after you obtained the licenses was it?

A. We obtained the licenses on the 15th and it was right after. Not immediately after. By the time we made our anchors and cables which took us several days; maybe a week.

Q. How much of a task was it to prepare these anchors and cables and buoys?

A. It was quite a little task. We had to drill a hole through the rock, which weighed three hundred pounds, something that could not be dragged away

(Testimony of J. P. Coyle.)

easily, something to establish an anchorage. We drilled holes through and put the chain through the rock and then back up around to the other part of the chain, with a clamp. Wire was connected to it and made quite tight. We had three rocks for each location.

Q. Do you know what those anchors were reasonably worth?

A. I don't know; it took quite a little to drill them.

Q. Where did you get the rocks?

A. We got them on the beach in front of the cannery, from the jetty.

Q. Did you find them on Sand Island?

A. No; in front of McGowan's cannery on the mainland of the Washington shore.

Q. And took them out how?

A. In a boat and took them down to the location in front of Sand Island and placed them.

Q. How much labor would be necessarily expended on each of them? [285]

A. They must have cost us, wire cables and all, about fifty dollars, with the labor.

Q. How many of the anchors did you all three take out?

A. We took enough for the eight locations.

Q. That would be 16? A. Sixteen.

Q. Were they all placed there? A. Yes, sir.

Q. Were they all placed on the same day?

A. All placed on the same day.

Q. And you had three? A. I had three.

(Testimony of J. P. Coyle.)

Q. How many did Mr. Lindstrom have?

A. Three.

Q. And Mr. McGowan? A. Two.

Q. Were they all below the line of low tide?

A. All below the line of low tide.

Q. Did you actually fish those locations?

A. No, we hired men to fish them. We were making preparations to fish them with nets. We had two men to start operations.

Q. Where were these men?

A. They fished along there, yes, at the location grounds of the set nets.

Q. Did you actually put in your nets and fish the locations in 1908? A. Yes, we started the nets.

Q. Had you actually got your nets on the ground?

A. We got in one net.

Q. Why did you quit?

A. We were stopped by the injunction.

Q. In this suit? [286] A. In this suit.

Q. Did you have any other reasons for stopping?

A. No.

Q. After these buoys were anchored out, did they remain there?

A. No, I understood they were removed once or twice; we replaced them twice and some of them were replaced a third time. I don't know just how many.

Q. Did you know personally who took them out?

A. No, not personally.

Q. How many years had you been acquainted with that fish place before 1908? A. Since 1903.

Q. Had you fished there?

(Testimony of J. P. Coyle.)

A. Yes, sir, I seined there in 1903.

Q. And each year since?

A. No; I have fished there some years but the last few years I have not.

Q. Did you ever do anything yourself towards clearing that ground?

A. I cleared that ground when Mr. Brumbach owned it once. I did it for him.

Q. What year was that?

A. It must have been 1900 I think when Brumbach,—or it might have been 1899.

(Witness continuing:)

In 1900 or 1899 Brumbach occupied that territory seining for salmon. After that he sold out to McGowan, and I cleared part of the trap location for P. J. McGowan and Sons. There were piles in there which obstructed our seines and I cleared them out. I know of two fish traps being operated on that ground. I operated one of them. The reason I quit was that the sand filled [287] on that point and closed those traps on the island. Afterward the channel washed away and those pile stumps were exposed as the island went north so that they were an obstruction to seining. One of these traps I think was operated two seasons, the upper one, that is the easterly one, and the other one was operated three years to my knowledge. I don't know how long before that time. A salmon trap is constructed by driving piles in the bottom of the river, the lead is drove straight out according to your current, and then there is what you call the heart, the row of piles

(Testimony of J. P. Coyle.)

in a heart shape, which is supposed to hold the fish and corral them. The heart is at the outside end of your lead, or if it is a double trap there is one lead on each end, and the pond or pot as they call it, is drove outside of the heart. In the Columbia River traps the pot is drove on the upper side of the heart and at the entrance of the heart into the pot; the heart connects with the pot by web and there is a gate in the lead from both sides and the web connects there leaving a space of eight feet on each side. The cotton web is put on these piles. The pot has two spaces which are called gates to let the fish in and that is made out of cotton web. The fish go into the lead, then through the gate into the heart. The heart is so constructed that it will lead the fish up to the entrance and into the pot. The piles are driven on the slant of the current to lead them into the pot. The traps are of different length, some from 300 feet to six or seven hundred feet long. I have been referring to the Columbia River.

I think I know what it would reasonably and probably cost to operate these set net locations, which I have testified to, per season. We had an arrangement to operate them together. We each had our own locations. It would take two men to operate two locations as they should be worked, and a man would cost $3 a day, and it would take eight men to operate the eight locations [288] and somebody to take care of them at night and watch them; then you would have to have four boats, small boats, to operate eight nets, and two boats at least to take care of your

(Testimony of J. P. Coyle.)

fish, with the assistance of a launch to handle the
and bring them to the station and so forth, or
your nets to the rack for repairs, and carry the
to and from their work. You should have two
for each location because you cannot keep a net in
water all of the time. They get more or less bro
and have to be repaired and while one is being
paired you could use the other. You would hav
have about sixteen nets to operate successfully an
put these nets in would cost in the neighborhoo
$500, if not more, and this would be the cost for
entire sixteen nets. That means, of course, that
net should be fully equipped with cork and lead li
then your labor, eight men at $3 a day for about
months; three dollars a day and they board th
selves. I figure that the actual cost of these nets
to operate them those two months would cost al
$3,000. That is taking the fishing season for
year. The fishing season opens on the first of
but the net locations are not profitable to fish be
the last of June or the first of July. The fishing
son closes on the 25th day of August. I had inter
in good faith to operate these locations in 1908,
was making all due and reasonable preparation
that end. I think I know the market price of
in 1908. I think small salmon was five cents
large six cents in 1907. That is five cents a po
for cannery salmon and six cents a pound for la
salmon delivered at the station, that is at the can
station. In some instances cannery launches w
come and take the fish from the grounds, they

(Testimony of J. P. Coyle.)

erally did that at the seining grounds, and you generally have gathering stations on your own grounds, and the prices I have just quoted is the price of fish on the grounds. [289]

Q. Judging from your knowledge of the run of fish at this location in June are you able to state what the reasonable amount of the catch would have been in tons per year per season in 1908, 1909, 1910?

To this question counsel for the plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial, and that the witness was not competent.

A. These eight nets, according to my opinion, if successfully operated, would get over one hundred tons of fish for the season, and that would be true for each of the said three years, and I believe according to the fish caught there the last two years it would be more. The character of fish caught on these grounds during said time were Chinook and steelheads. Chinook is supposed to be the best fish in the river. Steelheads are not so high priced as Chinook, it is more of a cold storage fish. The Royal Chinook commands the highest price. There is no salmon which commands a higher price than the Chinook. The prices that I have given is the average of all the fish marketed down there. During the years 1908 and 1909 the price was higher. Cannery salmon were six cents in 1909 and larger salmon were seven cents, that is salmon over twenty-five pounds. In 1910 small salmon, if I remember right, was six cents and large salmon seven and a half cents, and in some cases

they paid eight cents.

The expense of operating, in my judgment, would not have varied materially during these years. The expense of operating would be about the same each year.

Q. The only difference then in the situation would have been a higher price for fish during the years succeeding 1908?

A. Yes. The same price for operating but a higher price for fish. [290]

Cross-examination.

(Interrogated by G. C. FULTON.)

I am working for P. J. McGowan and Sons and have been working for them for about fifteen years on a salary. I am employed the year round. I was working for P. J. McGowan in 1908 on a salary. I made sixteen of these buoys and they cost altogether $50. I did not pay for them; my labor went into them, and that is all it cost me. I was paid by Mr. McGowan my regular salary during the time I was employed in making them. I made all of these buoys in the daytime, and at that time I was drawing my regular salary.

Q. What do you mean then by paying for them with your labor when McGowan was paying you by the month?

A. I mean this way, that I have shared in the expense of that location and have done so. I have never paid anything yet. Mr. McGowan has never furnished me a bill of the costs, and I have never asked him for a bill.

(Testimony of J. P. Coyle.)

The defendant Lindstrom is also a fisherman and he also worked for P. J. McGowan and Sons. I don't know whether for a salary, wages, or how.

Mr. McGowan first suggested putting out these set nets on these grounds. He told me that set nets could be operated at Sand Island. He did not come to me and say that we could get them, but that there was a show for set nets on Sand Island. I said if there was a show for anything like that I wanted to take one. I said I would take one or take what I could legally fish. Mr. McGowan did not tell me that he wanted to fight the Columbia River Packers' Association. It was this way, the two States were having trouble and there was a chance for set nets in front of Sand Island; a chance to get a fishing ground and make something. I did not understand I was to cork anybody, and I supposed I had [291] a right to fish on the river. At the time I knew there was a seining party had a license on the south shore of Sand Island from the Government.

Q. And you knew that by putting these set nets in there where it was proposed to put them, that it would cork these seining rights on Sand Island?

A. One is on the shore— (Interrupted.)

Q. Answer the question.

A. That it would cork them you say?

(Question read.)

Q. Did you ask him who it was proposed to cork?

A. No.

Q. Did you say anything to Mr. McGowan as to

(Testimony of J. P. Coyle.)

where or whose seining rights it was proposed to cork? A. No.

Q. Did he tell you whose seining rights it was proposed to cork? A. No, sir.

Q. Didn't you know it would involve you in litigation or a lawsuit? A. It might.

Q. You thought that did you; did you say anything to McGowan about it? A. No.

Q. Was there anything said there about putting in these set nets when Mr. McGowan first spoke to you? A. No.

Q. Only what you have stated? A. No.

Q. That was all that was said? A. Yes.

Q. Did you know what grounds, or in front of what grounds, it [292] was proposed to put these set nets? A. I know my ground.

Q. At the time Mr. McGowan spoke to you first, did you understand in front of whose grounds or seining right it was proposed to put these set nets?

A. I don't know of any seining right. I know I was going to get a set net license in front of Sand Island.

Q. And you knew Sand Island had been rented by the Government to different parties for seining purposes?

A. They had begun to for the last few years.

Q. And you knew that the Government had executed leases for seining rights in front of Sand Island? A. For a few years, yes.

Q. You knew that at the time Mr. McGowan came to you, that the entire frontage of Sand Island had

(Testimony of J. P. Coyle.)

been leased for seining purposes? A. Yes.

Mr. DORR.—I object to this as being incompetent, and not in harmony with the lease introduced by the plaintiff. No evidence in this case that the Government ever leased anything below the line of low tide.

Q. Knowing that these rights had been leased and that you proposed to put these nets in front of these leased rights, you tell the Court you had no curiosity as to who the individual was that you proposed to cork? A. No; I had none.

Q. You had no curiosity whatever?

A. I want to state that I had a right to fish the Columbia River with set nets as long as I did not touch their land, and I still think I have that right.

Q. So you didn't bother as to whether it was some personal friend or some enemy? [293]

A. No, I supposed I was holding my rights.

Q. Did it make any difference if some personal friend of yours had obtained the lease from the Government, you proposed to put your set nets in front of his ground regardless of whether he was a friend of yours or whether you were corking him or not?

A. I have the right.

Q. You were perfectly willing to do that?

A. Yes.

Q. You didn't take into consideration who the party was?

A. It made no difference; it was a business proposition.

Q. You did not know it was in front of the Columbia River Packers' Association? A. No, sir.

(Testimony of J. P. Coyle.)

Q. You knew of course that you might get into a lawsuit in case you did that?

A. I did not know but I might.

Q. You thought so and figured if you did you might get into a lawsuit? A. It might be; I don't know.

Q. But you didn't say anything to McGowan about that?

A. No, I did not. I thought I had the right.

Q. Why didn't you, while Mr. McGowan was fishing these grounds, why didn't you put set nets in front of his place, since you knew you had the right?

A. The idea came to me on account of this trouble with the two States.

Q. When McGowan was there, the trouble was on?

A. I don't know about that.

Q. You don't wish to be understood that simply because there was trouble between the two States, the law would be different? [294]

A. There might be difference in the waters and the channel.

Q. That is, you would have to cork anyone fishing in Oregon but not in Washington?

A. The boundary might throw the piece of land in this State, that used to be in that State, and would change the fishery so that a man might hold it.

Q. In other words you wanted to steal it?

A. No.

Q. If held to be in Washington, it would still belong to the man who fished it?

A. I don't know; it don't look that way to me.

Q. Suppose it had been in Oregon; would it still

(Testimony of J. P. Coyle.)

belong to the man who fished it?

A. I don't see it that way.

Q. You knew they had been fishing there right along? A. Yes.

Q. And claimed to have the right? A. Yes.

Q. And by putting your set nets there you were stealing it?

A. No; I was simply exercising my rights as a set net location. The State allows me a license and I am not stealing when I fish.

Q. As I understand your position, you claimed at that time under the laws of Washington, if one was fishing a seining ground and had his notices up you had a right to go out in front of him in his ground, and put down set nets and maintain them?

A. I had a right to put down set nets wherever I got a location.

Q. That is not the answer.

A. Sand Island did not belong to anybody. It is a different proposition. You buy the seining ground from the Government [295] but Sand Island don't belong to anybody. I have a right to set nets there as well as any seiner.

Q. Why didn't you exercise that right before?

A. When the trouble came up about the two States, if I had a set net location and fished it, I had a chance to own it.

Q. Why did you confine it simply to the front of Sites Two and Three?

A. I confined it to that place where I picked out for my advantage.

(Testimony of J. P. Coyle.)

Q. If it was such a good proposition, why didn't you extend it along the entire front?

A. I had all I could handle then.

Q. Did you pay Mr. McGowan or anybody else for the employment of these two men?

A. I guess Mr. McGowan paid him; I contributed my labor.

Q. Now did you pay? A. No, I did not.

Q. Was any bill rendered to you for it?

A. Not yet; it is not settled yet.

Q. Did you order personally any nets to fish your three seines?

A. No. Mr. Lindstrom and I ordered the depth and length that we were supposed to fish.

Q. Did you order the nets?

A. We gave the order to the company.

Q. Did you order them?

A. I ordered the company to put what kind of nets.

Q. Did you sign the orders? A. No.

Q. Did the company charge you with this net?

A. The company were charged I guess.

Q. You were expected to pay it?

A. Our expense. [296]

Q. You would have been expected to pay for the nets if the company furnished them? A. Yes.

Q. And you understand that the company was to order the nets and charge you with the expense of the nets?

A. That is the habit with the canners along the Columbia River.

Q. That was your understanding? A. Yes, sir.

(Testimony of J. P. Coyle.)

Q. And thus far you have not been furnished with any expense account whatever?

A. We have had the expense of these buoys and making the preparations of those nets.

Q. You have been charged with it?

A. It is not settled yet.

Q. Who paid your expense up here as a witness?

A. I did myself.

Q. Did Mr. McGowan furnish you any money for that?

A. Anything he furnishes me is charged up to my account. He did not furnish any.

Q. Did he agree to? A. No.

Q. Did he say anything about it?

A. No. My expenses go to the company when I work for them, and when I leave them I pay my own expenses.

Q. Do you expect McGowan to pay your expense?

A. P. J. McGowan to pay my expense when I am in their employ.

Q. You expect them to pay your expense up here as a witness in this case? A. No, I do not.

Q. Why not?

A. Because I have this license in my own name.

[297]

Q. You expect to pay all of your expense up here and back and not to make any claim to P. J. McGowan & Sons?

A. My expenses will come out of these set nets when that question is settled.

Q. Suppose it is settled against you?

(Testimony of J. P. Coyle.)

A. If it is, then I guess that is my loss.

Q. You don't expect McGowan and Sons to pay you anything for your expenses up here?

A. I don't know whether they will or not.

Q. What is your anticipation about that?

A. I don't know.

Q. You rather think they will not?

A. They may or may not; I have not asked them that question. The question was never put to me.

Q. By the way, these nets you ordered for those set nets, were how long?

(Witness continuing:)

The set nets which were ordered would hang about 300 feet in length and would weigh in the neighborhood of 120 pounds when dry. They were about 24 feet in depth. I have made set nets and put the lead on about every 14 inches according to the current. Each piece of lead would weigh about three ounces; I don't know exactly. I think that if the net was wet it would weigh, cork and lead lines together, about 300 pounds. I did not see any set net fishing south of Sand Island. I was not there. I did not know whether they got any fish or not. I started to operate in the middle of June and had, as I understand, about five days of fishing, but I do not know whether any fish were caught or not. I was not sufficiently interested in fishing there to inform myself whether or not my set net was fished or whether it caught any fish.

Q. How did you propose to anchor the lower end of your set net, these lead lines? [298]

(Testimony of J. P. Coyle.)

A. We fastened them to the wire cable.

Q. At the top? A. No, at the bottom.

Q. How would you get down there?

A. Raise your anchor.

Q. Your idea was to raise the anchor and tie the lead line to the anchor? A. Yes.

Q. Not to the wire cable?

A. To the wire cable at the anchor.

Q. To operate the set net, you would have to anchor the lead line at the bottom of the river?

A. Yes.

Q. And the cork line on the surface of the water?

A. The cork line don't have to be made fast on top, as long as your lead line is fast.

Q. You think that an anchor weighing 300 pounds would hold a net weighing 300 pounds.

A. The anchors would be 600 pounds, one on each end, and you must remember your set nets, when you put them down, you rock them down when there is a strong current. The little lead line *line* you have on the gill net will not hold the set net; you must put rocks to hold them in position, because it has to be stationary. For the set nets you must put the rocks.

Q. Heavy rocks?

A. Well, small rocks, 4 or 5 pounds weight, like a trap.

Q. How many?

A. According to your current.

Q. You know there is a very swift current by there?

(Testimony of J. P. Coyle.)

A. Only for about two hours, in the first of the ebb; that is the only time it is swift. [299]

Q. Did you provide for rocks to anchor at the bottom?

A. We did not get a chance to get to that part.

Q. You had several days, didn't you? A. No.

Q. You insisted on putting these anchors back in there?

A. We had to put them in to hold our location in order to get ready.

Q. You had found them to operate?

A. We did not figure on operating until the 1st of July, or the last of June.

Q. So you got no rock to make the anchors?

A. We had rocks handy.

Q. But you did not need them?

A. No, we were getting it.

Q. But did you get it? A. Not on hand.

Q. Did you ever operate a set net in front of Sand Island? A. No.

Q. Did you ever know of anyone operating any there? A. No.

Q. You don't know whether it is practical or not?

A. I think, in my opinion, it is.

Q. But you don't know.

A. I never got a chance to try.

Q. And therefore you don't know; you are only guessing?

A. I don't see why it is not as good a fishing place as any.

Q. Then if that is true, and you knew you could

(Testimony of J. P. Coyle.)

catch eight tons of fish with these three nets all these years, why didn't you put them in before and get the money? A. I didn't know it.

Q. And not work for wages all your life?

A. I didn't know it then; didn't think of it. [300]

Q. Mr. McGowan was the man who suggested it?

A. Lots of men don't think of such things.

Q. You were familiar with the ground out there and knew nobody had any rights out there; it was everybody's territory?

A. It was, and still is, I think.

Q. Why was it that it happened to be in front of Sites numbered Two and Three that these set nets were placed?

A. That is the best set net ground; we did not want to put them in a poor location.

Q. In front of which site did you put your three set nets? A. In front of Site Number Three.

Q. You heard Mr. McGowan say that he thought the best were in front of Sites Two?

A. I guess it is; I won't dispute his word on that.

Q. So, as a matter of fact you did not get the best set net location?

A. No, but I got the next best I could, though.

Q. Now, these set nets are only three hundred feet long? A. Well, they may be more.

Q. You put in the order?

A. About 300. They might run 350.

Q. You have an order for the nets you said; how long were they? A. Well, say 300 feet.

Q. What do you say?

(Testimony of J. P. Coyle.)

A. I will say 300 to settle the account.

Q. You estimate that these nets 300 feet long, your three nets, would catch as many fish as two seines that were 1,250 feet long, operated at the same place; that is your estimate, is it?

A. I don't know about that; I know what I estimate the set nets would catch if properly worked.

Q. About 300 tons? A. Yes. **[301]**

Q. And the seines they tell me only caught about 80 tons, as testified to by Mr. McGowan, and they were about 1,250 feet long. Explain why you think that the three set nets only 300 feet long, to be tied down stationary, and the only way to catch fish would be to gill them, would catch 100 tons, whereas the seining operation which cost about one hundred dollars a day to operate, only caught about 80 tons.

A. You misunderstand me. I mean on the eight locations. I don't mean just the three.

Q. Well, about how many tons of fish did you estimate your three set net locations would catch?

A. My three ought to get about thirty tons of that.

Q. Where did you ever operate set nets?

A. North River.

Q. That is a little bit of a tidal stream?

A. Well, you can't jump over it.

Q. How wide?

A. It is about 400 feet across the stream.

Q. How long was the net you operated?

A. Oh, about 100 feet.

Q. And how many tons did you catch there in the season? A. I don't know; I did not weigh them.

(Testimony of J. P. Coyle.)

Q. What made you quit?

A. I was fishing it for P. J. McGowan in the North River. We used it in our trapping.

Q. How long did you operate it?

A. I operated it one fall.

Q. Did you ever operate a set net at any other time? A. No.

Q. Your only experience was in North River, which is nothing more nor less than a slough? [302]

A. No, it is not a slough.

Q. You swear it is not?

A. It is a river, navigable.

Q. Is it navigable beyond tide water? A. No.

Q. You can jump across it above tide water?

A. Yes, but those set nets were not above tide water.

Q. It is just what you call a tidal slough?

A. Well, you can't walk across it.

Q. But when the tide is out, you have no water there?

A. Oh, yes, there is water there.

Q. How much?

A. Right at that location there is about eight feet of water.

Q. But it is not navigable at low tide?

A. They come to that location.

Q. But I am talking about the river; you cannot navigate the North River at low tide?

A. You can go past this location.

Q. In what kind of a boat? A. Fish launches.

Q. I am talking about zero tide, low water; will

(Testimony of J. P. Coyle.)

you swear that North River is navigable from its mouth up to where you say your fish trap was located?

A. Yes, a fish launch can go up to that set net at low water. Those fish launches go there. It is in the entrance to North River a little ways in.

Q. The North River runs through the tide lands?

A. Yes.

Q. And its head is a small stream called North River, which you can jump across?

A. You never could jump across it as far as I know.

Q. You mean the river beyond the tide land?

[303] A. No, you cannot.

Q. Well, it is not over six inches deep?

A. Yes, it is.

Q. It is a small mountain stream.

A. It is a small mountain stream, but deeper than that.

Q. How wide is it above tide water?

A. As far as I have been, it is say all the way from 50 to 100 feet,—50 feet is the narrowest that I have been up.

Q. How far were you up? A. Two miles.

Q. What is the average depth?

A. I did not sound it.

Q. But you could see it?

A. I could see with my eyes.

Q. It is just *line* one of these average streams, about fifty feet wide?

A. Fifty or one hundred feet.

(Testimony of J. P. Coyle.)

Q. It is just like one of those mountain streams and leads into the tide land? A. Yes.

Q. And then you come to this broad, wide, deep place, and you operated a set net one fall in this North River; that is the only experience you had in operating set nets? A. Yes, sir.

Q. What makes you think that you could catch about thirty tons with these three nets?

A. A fisherman understands his business and ought to know.

Q. But your experience is only limited to one fall fishing on North River?

A. I fished 20 years on the Columbia River, but only one fall with set net and traps is where I had experience with all kinds of gear. [304]

Q. You operated a set net one fall season on the North River?

A. A fisherman doesn't have to have ten years' experience; one is sufficient.

Q. And that is the reason you could probably catch 30 tons with your set nets, based upon your experience as a fisherman one fall fishing on the North River, when you don't know how many fish you caught?

A. I could not keep count; I was working for wages; but I delivered the fish, that was all there was to it.

Q. As a matter of fact, those nets which you claimed you were getting ready to order for these three alleged sites that you took up in front of Site Number Three, never were ordered and never came?

(Testimony of J. P. Coyle.)

A. They never came; I don't know; we had the web there at the cannery.

Q. They always kept sufficient quantity?

A. Some kinds.

Q. But they were never manufactured?

A. They were never completed, you mean?

Q. Were they ever started? A. Yes, sir.

Q. Who started them?

A. That gentleman there, Mr. Lindstrom.

Q. He started them? A. Yes.

Q. How much work did he do on them?

A. He worked,—I don't know how much. I know he started to get the web ready to hang.

Q. Do you know whether he started to hang it?

A. I don't know.

Q. The web was already made?

A. Well, yes, but you must make the nets. [305]

Q. What did he do?

A. I guess he cut the web to suit the water.

Q. Had he hung the lines?

A. Not that I know of.

Q. Did you pay him for the work?

A. I did not.

Q. Did he put in a bill to you for it? A. No.

(Witness continuing:)

A. I did not say that I owned a fish-trap on Sand Island. The fish-trap that I referred to belonged to P. J. McGowan and it was in Oklahoma channel. It was not in front of Site Number One, but was in front of Site Number Two. I know this trap location was in Site Number Two. There was no such

(Testimony of J. P. Coyle.)

thing as sites then. At the time this trap was operated the channel was no further east than it is now. There was a channel in there between the "Republic" wreck and Sand Island and this trap was in this channel. It was southwest of Sand Island. It was west of the south point of the island and the island has since made out, bringing the trap in front of Site Number Two.

It would require eight men to operate eight set nets and one man to watch; that would be nine men at $3 a day, which would be $27 a day to operate. In addition to this you would have to employ a launch at a cost of six or seven and a half dollars. It would cost something to keep the nets in repair, but a very small amount.

Q. Is there a set net in the lower Columbia River in front of any sand island in the river?

A. I don't know; I am not familiar with all the river.

Q. But the portion of the river that you are familiar with, is there or was there operated during the year 1908 and [306] 1909 and '10, one single set net in the channel of the Columbia River near any sand island that you ever heard of or know of?

A. Well, no.

Q. So that you don't know whether it is a practical experiment or not, but simply you are theorizing on it?

A. I know it is very successful in places.

Q. But is it in the Columbia River channel a success? A. Yes.

(Testimony of J. P. Coyle.)

Q. Where? A. Up the river.

Q. I am talking about the lower Columbia River?

A. I don't know.

(Witness continuing:)

The reason we did not begin operating these set nets until the latter part of June or the first of July was that fish don't generally come along the shore there early. It was not profitable and there was more or less drift in the early part of the season. That was the only reason. I only fished there one season, 1904. The only experience I have had with Sand Island was during the year of 1903 and 1904.

Q. Don't you know as a matter of fact, Mr. Coyle, that you cannot possibly maintain a set net at that place; that the gill net fishermen's seines would entangle it and take it out?

A. You could maintain it all right; the only trouble would be the gill net men interfering.

Q. Four hundred feet out from the shore would be right in front of the innumerable gill nets that come down that channel.

A. We have the same trouble that the seines have.

[307]

Q. But they have to pull their seines in?

A. Certainly.

Q. But you cannot pull in your set nets?

A. No.

Q. So that when these gill nets come down it would just simply take out your set net anchor, wouldn't it? A. No, it would destroy their net.

Q. And about that time there would be twenty fishermen on top of you, and your anchors would not

(Testimony of J. P. Coyle.)

last long? A. They might or might not.

Q. What is your judgment about that?

A. Well, I don't know. The fishermen are not as bad as they used to be. They are more friendly than they used to be.

Q. One of their nets costs about how much?

A. Something like two hundred dollars.

Q. They cost five and six hundred dollars, don't they, a good gill net, and by the time your obstruction cut one in two, what do you think the consequences would be?

A. I don't know; I suppose there would be trouble, as there has been before.

Redirect Examination.

(Interrogated by Mr. DORR.)

When I spoke about working in 1903 and 1904 I intended to say and meant to say 1893, and this refers to all of my testimony where I have used those dates. At the time I applied for my set net license, in June, 1908, and when I located my anchors and buoys at the places mentioned, I did not know and I had no idea that anyone had a lease from the Government or anybody else on the ground upon which I located, and when I said that I had heard that they had a lease out there, I meant that the lease might cover the island; the Government gave them a lease for the land. **[308]**

I had never heard, nor had anyone intimated that either the plaintiff or anyone else had any prior right for the ground upon which I located below the line of low tide. I did not consider that I was interfer-

(Testimony of J. P. Coyle.)

ing with the legal rights of anyone else. I considered my right was legal. It was state waters and I supposed that the State had jurisdiction on those waters and it was not covered by any license. Corking is a word amongst fishermen that means to lay or drift in front of another. You put your net in front of his. I put my net in front of Sand Island.

Recross-examination.

(Interrogated by Mr. FULTON.)

Q. Don't you know as a matter of fact that the State of Washington actually deeded by legislative enactment all of the bed of the Columbia River surrounding Sand Island to a depth of fifteen feet below low water to the United States? A. No.

Q. If it turns out that the State of Washington did so, and you put your buoys in eight or nine feet of water, you were putting them on the Government ground, weren't you?

To this question counsel for defendants then and there objected upon the ground that the same was calling for a conclusion of law.

A. No, I don't think so.

Q. But, as a matter of fact, if your buoys were only in fifteen feet, and not to exceed seven or eight feet of water, and the United States own to the depth of fifteen feet, you were on land belonging to the United States?

A. The inside buoy was in about six feet of water at low water.

Q. Well, the outside one was in about fifteen?

[309] A. I think so.

(Testimony of J. P. Coyle.)

Q. Then you were absolutely on Government ground? (No response.)

[Testimony of Erick Lindstrom, for Defendants.]

ERICK LINDSTROM, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

My name is Erick Lindstrom; age forty-four; residence McGowan, Pacific County, Washington. I have lived at McGowan with my family for five years, but I have lived in the State for about eighteen years. My business is fishing; I followed fishing in the old country and in this country. The first I did here was with drift net on the lower Columbia River in 1889. In 1891 or 1892 I was fishing with gill nets—I mean hooks. In 1896 I fished with set nets on the Columbia. We operated three until the time the freshets got high and we could only operate one. I operated this one about three weeks; it was about 350 feet long and was there during the high water. We used small mesh and caught big Chinook salmon. We caught about a ton and a half a day on the average; the entire season was 83 tons from these set nets and the record shows that in the cannery to-day. That was on the Columbia River in the year 1896. Set nets are constructed as follows: Where you have a shore right you fasten one end of the line to a tree or rock, and fasten that to the cork line on the net. You lay your net out and have anchors on the outside end. We use two anchors during the high water where the current is

(Testimony of Erick Lindstrom.)
strong, weighing from 150 to 200 pounds each. If I was not permitted to land on shore I would anchor the net where my right started, lay it out the same way, lay out the net and anchor the other end with a buoy and line fastened to the anchor so that I could haul it up any time when necessary. Where the current was **[310]** strong, that when we were running nets with an ordinary skiff, eighteen feet long, we had sometimes to let the nets go—it would pull our boats under. It would slack up a little at times, and when we could run the net successfully we had all kinds of fish. I am acquainted with Sand Island and know the territory on the south side of the island in front of what is called Sites Two and Three. In my experience I found it to be a real good place for set nets. You can fish there at almost any time, day or night. Part of the time the current was as strong there as at other places where I fished, but the biggest part of the time it is not. The only portion of the twenty-four hours in which the current is strong at Sand Island is about two hours. The first of the ebb and about the middle of the ebb tide it is pretty strong.

I am one of the defendants in this action, and am the same party who took out the three set net licenses referred to by Mr. McGowan in his evidence. I took out three licenses numbered 1433, 1434 and 1435. After I took out these licenses I made the anchors sufficient for holding the locations on the place. I put a chain through the rocks which would weigh about 300 pounds, put a chain around the rocks

(Testimony of Erick Lindstrom.)

about eight feet long and fixed it so it could be connected, and fastened the chain around the rocks, and attached 25 feet of wire cable to the chain with a wire clamp and used a cedar head, four feet long by eight inches square, and spiked the numbers to the buoys. These numbers were painted on boards six or seven inches wide and about twenty inches long, and painted with light lead color, and the numbers were painted on with black lamp black and oil, and the numbers were very plain—anybody could see them. The length of the figures were about seven inches. All that I did with these buoys was I planted them and left them. I planted them in front of Sites numbered Two and Three, my two locations in [311] front of Site Two and one in front of Site Three. On the Columbia River side of the stream at low tide the inside buoy was below low tide towards the Columbia River. These buoys were planted about 500 feet apart, I would judge. I haven't the exact measure. I planted them there on the 16th day of June, 1908. After they were planted there, we three together, the defendants McGowan, Coyle and myself, secured two men to look after the proposition.

Q. Did you take any steps to procure the gear, nets and other paraphernalia necessary to fish the locations?

A. All the steps were taken; they were brought into the office to be in position to order the gear. We figured out what gear it would take and put the order into the office, to order all our stuff.

(Testimony of Erick Lindstrom.)

Q. Did you fish the location? A. I did not.

Q. Why didn't you continue operations there?

A. They had papers served on us; we couldn't do it.

Q. What do you refer to by the papers served on you; was it the injunction in this suit?

A. We were stopped by the Columbia River Packers' Association from taking any further steps, fishing in the location, by the injunction in this suit. Since that time we made no further attempt to fish the ground.

(Witness continuing:)

I was intending to fish my three locations in 1908. I looked on Sand Island as one of the best fishing grounds on the river. I have been a fisherman since childhood, and that was one of the grounds where I could make money, but could not do it on account of being pushed off the earth.

If it had not been for the injunction that was served in this suit I would surely have fished these locations of mine, **[312]** and I would have continued to fish as long as I had the legal right to do so. According to the arrangements I had with McGowan I had the right to sell my fish and get the money, provided I sold the fish to McGowan at the regular market price.

I know the market price of salmon during the year 1908. It was five and a half and seven cents. The cannery salmon sells for less than the big salmon. For any fish up to thirty pounds the price was five

(Testimony of Erick Lindstrom.)

cents per pound, and above that seven cents. During the subsequent years the price was raising—the first two years was about a stand-off, and last year it was six and one-half and seven and one-half. This was the price paid on the grounds. We never had to pay for delivery. The launches pick them up and we get the same price as when delivered at the cannery.

Q. Can you tell what, in your opinion, was the reasonable quantity of salmon to catch at the locations where you located your set nets, per season, considering the eight nets as being operated as they were located?

To this question counsel for plaintiff then and there objected upon the ground that it was incompetent, irrelevant and immaterial and not the proper rule to the measure of defendants' damages.

A. I would not call myself a fisherman at all if I could not average fifty tons a year out of my location. (Witness continuing:)

I think that was a reasonable quantity to be produced from my three set nets. I used my own judgment in making my locations and the other defendants used theirs. I could not tell which was the best location. I presume probably they would average pretty near as good. **[313]**

Q. What would it have cost you to operate these eight nets per season, in your opinion?

To this question counsel for plaintiff then and there objected upon the ground that it was immaterial and irrelevant.

(Testimony of Erick Lindstrom.)

A. I am poor in figures, but the three of us figured it out together, and the total amount was $3,000 for the season.

Cross-examination.

(Interrogated by Mr. FULTON.)

I live at McGowan and I have a wife and nine children. I am working on one job and another, working for P. J. McGowan and Sons. This is a corporation of which H. S. McGowan is general manager and president. They have a cannery at McGowan, but they have moved their cannery business down to Ilwaco. McGowan is now just a receiving station, warehouse and office. They get their salmon down to Ilwaco by their fishing launch. This launch runs in the water. We navigate the waters inside of Sand Island to Ilwaco. Fishing launches navigate these waters between Sand Island and the Washington shore on high tide whenever they have anything to ship. This cannery was moved from McGowan to Ilwaco about six years ago, I think—five or six years. It was moved down there by P. J. McGowan and Sons, and they have been operating a cannery at Ilwaco ever since. The only way they have of receiving fish is by boats navigating the waters of Bakers Bay north of Sand Island.

I have been working for P. J. McGowan and Sons since 1895 on a salary. I began working there in 1895, and have worked there ever since excepting one season. I couldn't remember just what year that was that I didn't work. I was working for P. J. McGowan and Sons in 1908 on a salary. [314]

No. 2396

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Appellees.

VOLUME II.

(Pages 353 to 755, Inclusive.)

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

(Testimony of Erick Lindstrom.)

Q. Now, you said you obtained three licenses for set nets?

A. I took out three licenses in my own name.

Q. Did you pay for them yourself?

A. I haven't a bill for it; my earnings are in the office and my expenses are paid and I don't have to pay until I get the bill.

Q. Have you received a statement of account since June, 1908? A. Yes, I had a yearly statement.

Q. Were you charged with these three license fees? A. No, I have not seen that.

Q. You were not charged with the cost of constructing the three anchors in this statement which was furnished you?

A. No, McGowan would not charge me anything; it was a failure; I had a big family and he took pity on me and I didn't see any charges against me.

Q. Did either of the McGowans make a statement of that character to you?

A. They do not brag about it.

Q. They did not say a word to you? A. No.

Q. You and the McGowans never discussed the expense you went to in these fishing operations?

A. No, sir, expense don't count with those gentlemen.

Q. You employed some men to look after these set net locations? A. Yes.

Q. Who were those gentlemen?

A. Iver Stensland and a man named Bussey.

Q. Which was the cowboy?

A. Bussey was the cowboy.

(Testimony of Erick Lindstrom.)

Q. How long did Iver Stensland and Bussey the cowboy work for you there?

A. I could not tell you; I was not down there any more. **[315]**

Q. You simply put in your three set nets buoys and came away? A. I helped to put them all in.

Q. You assisted in putting in the sixteen buoys and went away and gave the matter no further consideration? A. That is right.

Q. You did not give it any further attention?

A. No, I was stopped.

Q. You were not moving very rapidly when you were stopped; you were not making any record speed?

A. No; I saw when I was stopped I had to pitch in and make a living for my family; a man must keep busy.

Q. You don't know how long Stensland and Bussey worked?

A. No; I did not see when they quit or when they started, but I know when they were there, because they came up for more buoys when they claimed the others were taken out.

Q. You don't know how much they charged for their labor?

A. No; I haven't had any statement of it.

Q. What was your idea in putting those two gentlemen, Stensland and Bussey, as watchmen down there?

A. A man can hire most anybody for a watchman.

(Testimony of Erick Lindstrom.)

Q. But you don't understand; what was your purpose in that?

A. To see and find out when these buoys were taken away; where they went to; we weren't talking much to them; they were hired to put them there.

Q. They were not fishing?

A. They were supposed to fish; I didn't see them fish. I did not see the nets, but they said they had two set nets, but I did not see them.

Q. They did not fish any net for you?

A. I don't know whether they used my location or not.

Q. You furnished no net?

A. I did not furnish anything. **[316]**

Q. Didn't you think that was a piece of reckless extravagance for a man with a family of nine children to employ two men to watch some buoys in the river?

A. I supposed they were furnished fish nets, but I didn't see them.

Q. Did you employ them to fish any nets or simply to watch and see whether someone took up your buoys?

A. They were hired to look after them buoys and fish, but they put the nets on to hold the license until we were ready to fish.

Q. But you did not pay any attention to whether or not there were any nets prepared for fishing?

A. No, Stensland attended to that himself; he was a fisherman.

(Testimony of Erick Lindstrom.)

Q. How did you expect to get six nets to operate those locations?

A. We never got a chance to operate any.

Q. But when you started you expected to operate them and hired men to operate them without any nets. A. They had two nets.

Q. You didn't get them? A. No, I didn't.

Q. Now here, you would not want the Court to understand that you would claim that you employed these two men to fish eight set net locations that you tell the Court required eight men to fish?

A. They were there to hold and see about those buoys.

Q. They were simply there to watch the buoys?

A. Yes, and they had two set nets which they were supposed to use.

Q. But they were not your set nets?

A. They were fitted out, whether they got the gear from the cannery, I don't know.

Q. They were not yours?

A. They were not my nets, no. **[317]**

Q. As a matter of fact, you were not paying any particular attention to fishing, but wanted those men to watch those buoys?

A. I was not going to pay a great deal of attention until I was fitted out to fish.

Q. But you didn't really employ those men to fish eight set net locations?

A. No, they were simply hired to watch the buoys by us three.

Q. Hired by you three men to watch the buoys?

(Testimony of Erick Lindstrom.)

A. That was my calculations, and they had the nets, but I don't know whether they fished them.

Q. You never inquired whether they fished them or not? A. No.

Q. Did you ever ask whether they caught any fish or not? A. No, I never did.

Q. What kind of nets were these?

A. I don't know; I never saw them.

Q. You will pardon me if I appear to be curious to know why you hired them to go out there and did not pay any attention to whether they had nets or whether they fished or whether they caught fish.

A. I couldn't afford to look after the locations until I was ready to fish and I expect the fish to be there.

Q. The fish are supposed to be there about when?

A. The latter part of June and during the month of July and up to the close of the season.

Q. Now, as I understand, the men were not employed to fish these set net locations, but to watch them? A. I did not hire them to fish my location.

Q. But just to watch them.

A. To watch them, and they had two nets with them, and I supposed they fished, but I don't know.

Q. They were not employed to fish? [318]

A. I didn't own all of the locations.

Q. You did not employ them to fish?

A. I did not employ them.

Q. You were not there when they were employed jointly by yourself and Mr. Coyle and Mr. H. S. McGowan? A. Yes.

(Testimony of Erick Lindstrom.)

Q. And your understanding was that they were not employed to fish but to watch the buoys?

A. Yes, and they had two nets with them.

Q. That is, you heard that they did?

A. I did not see them; I heard that they had them.

Q. What was your idea of having them watch these set net locations, is that the general practice—hiring men to watch?

A. That is the general practice on the Columbia River. If you have anything of value you must have it watched until you are there to take care of it yourself.

Q. That is the general rule; when a man puts up his three location stakes for a fish-trap he has someone hired right there to watch them all the time?

A. Fish-traps, no one can take out your stake when it is driven in by a pile-driver.

Q. It is not the practice to watch the fish-traps and piling?

A. I don't know much about trapping; I am not a trapper.

Q. Now from 1905 to 1910 how many instances did you know where men were employed to watch an anchor for a set net?

A. I guess this is the first set nets I ever put out, and I had nothing to do with it.

Q. The reason I asked you this question. You said it was the general practice to do that?

A. When you have a valuable property.

Q. You were not referring to anchors of set nets?

[319] A. To anything of value.

(Testimony of Erick Lindstrom.)

Q. If you never heard of it being done, then of course you could not testify as to the general practice?

A. Not to set net licenses; that is something new on the lower Columbia River.

Q. So, there not being any practice in that regard, I hope you will pardon me if I ask you again why was it you employed these men simply to watch these anchors?

A. To see if they were taken away and so that we would know where they went.

Q. Did you imagine that someone would take them away?

A. When you have a good thing you may lose it, yes.

Q. Who did you imagine was going to take these away? A. I could not say that.

Q. You had no idea that anyone particularly, person or individual, would take them?

A. No; I knew I had a perfect right myself; I was not in anybody's runway.

Q. And yet you employed two men to go down there and watch them? A. Yes.

Q. What was the reason for that?

A. That is the reason.

Q. Did you inquire whether these set nets would interfere with the seining on Sand Island?

A. I have nothing to do with the seiners.

Q. But did you inquire as to whether or not this would interfere with anyone seining on Sand Island?

A. I did not find it my place to inquire.

Q. And did you inquire? A. No, sir, I did not.

(Testimony of Erick Lindstrom.)

Q. Of course you knew that the Columbia River Packers' [320] Association had rented Sites Two and Three?

A. I could not remember whether I knew it, and if I did I did not care. They did not run outside of the low-water mark, to my knowledge.

Is it not a fact that the reason you employed these men to watch these anchors you put there was because the Columbia River Packers' Association was getting ready to seine, and these buoys would be right in their way, and they would have to take them out or not seine?

A. There was nothing said why they were put there.

Q. But I say that was not the reason?

A. I cannot give you any particular reason.

Q. But that was not the reason?

A. I cannot answer that.

Q. Now listen, you knew that, if that is not the reason, that you had heard in a general way that the Columbia River Packers' Association had rented the sites and intended to operate a seine from the shore, and that in operating that seine they would have to take out your anchors? A. Well I should suppose.

Q. And was not that the reason you employed these men? A. Well they were there to watch.

Q. Wasn't that the reason you employed them?

A. I cannot give any particular reason; we did not have any particular reason to send them there. We sent them with two nets; that is all I can answer.

(Testimony of Erick Lindstrom.)

Q. Then you will tell the Court under oath that that was not the reason?

A. I cannot give any particular reason.

Q. Will you swear that was not the reason then?

A. All right; swear; I will not swear it was or was not.

Q. That is all right then. Why was it that you suddenly made [321] up your mind that the year 1908, and in the month of June, 1908, to put these set net buoys in front of Sites Two and Three; can you tell me that?

A. Yes, sir; I was fishing on the upper river and knew what set nets did there and when I came down and found Sand Island was one of the best fishing grounds on the Columbia River, and the best one, I picked out my sites and made up my mind the first opportunity I could secure a license, I would get them and fish them.

Q. Now at what particular psychological moment did you make up your mind to that proposition?

A. In the same year the license was taken out.

Q. Do you wish the Court to understand that during all these years from 1895 to 1908 you had not made up your mind to put in these set nets?

A. I was only down there five years on the lower river.

Q. When did you first come down to McGowan on the lower Columbia River? A. Five years ago.

Q. That would be 1905? A. Yes.

Q. Was that the first part or the last part of the fishing season?

(Testimony of Erick Lindstrom.)

A. In January; well, it was in the winter.

Q. It was in the winter of 1905? A. Yes.

Q. Do you think it was January?

A. I could not say exactly.

Q. When did you first become acquainted with Sand Island?

A. I was down there helping Mr. McGowan and saw the fish rolling in and they looked good to me.

Q. That was in 1905? [322] A. I think so.

Q. Was that in 1905 you were down on Sand Island where McGowan was fishing and made up your mind that you would get a set net proposition?

A. Yes, sir.

Q. Why didn't you put in set nets in the river?

A. I did not feel like doing that.

Q. Why? A. Because I was not ready.

Q. What do you mean by that?

A. A man must study on the thing a little.

Q. Was that the only reason you did not put set nets in front of where McGowan was seining, because you was not ready? A. No, I was not ready.

Q. That was the reason? A. Yes, sir.

Q. How long did you consider that proposition—all summer?

A. I considered it until I took out those licenses.

Q. You were thinking about putting set net locations in front of Sand Island from 1905 until June, 1908?

A. I was not losing any sleep thinking of it, but I made up my mind in 1908 that I would take up the license and I did.

(Testimony of Erick Lindstrom.)

Q. Anybody suggest it to you? A. No, sir.

Q. Not a soul? A. Not a bit of it.

Q. You wrote to the Fish Commissioner yourself?

A. I had McGowan write for me; could not write English very well.

Q. You spoke to McGowan and told him you would like to take out three licenses? A. Yes, sir.

Q. Did you know that McGowan had a fishing right there? [323]

A. I knew he would know whether there was a site or not.

Q. You were the first who suggested it to Mr. McGowan?

A. Well, I can't tell you that, I know I asked him.

Q. That was an important period in your life?

A. I asked him if I could get out set net licenses, and that I would send for them, and he sent for them for me.

Q. And that is all there is to it; did he say he would put in a set net there himself?

A. He did not tell me anything about it.

Q. Weren't you considerably surprised when you discovered that Mr. McGowan arrived at that same conclusion at the same time, and he had two licenses?

A. The more the merrier.

Q. You were not surprised at all? A. No.

Q. Were you surprised when Mr. Coyle also showed up with three licenses on the same Sand Island? A. Not much.

Q. When was it you three got together and came to some kind of an agreement?

(Testimony of Erick Lindstrom.)

A. When we signed up the application for the license.

Q. I thought you said a moment ago that nobody spoke to you about the application, but you told McGowan and he sent for it and you did not know he had any?

A. I seen them somewhere; I don't know where.

Q. The truth is that you three got together and set up this job that you were to get three licenses and McGowan two and Coyle three licenses?

A. I knew I was to get three.

Q. You all three got together and made up an agreement before you applied for the licenses?

A. I can't just remember about that. [324]

Q. That is not a very important feature in the transaction and you have forgotten? A. Yes.

Q. When was it that you and McGowan and Coyle came to terms; where did you agree to operate these set nets together?

A. It would be cheaper to handle them that way.

Q. I know that is a good scheme, but where did you come to a conclusion? Was it before or after you got your licenses? A. I wanted three licenses.

Q. But I want to know when it was you and McGowan and Coyle agreed together that you would operate these grounds together; was it before you applied for your license or afterwards?

A. I talked to McGowan first, and then I suppose they made up their minds to get licenses too, but that I have nothing to do with. Anyhow we got the three licenses at the same time.

(Testimony of Erick Lindstrom.)

Q. Now answer the question.

(Question read.)

A. I can't remember that.

Q. Do you remember where you were when you and Mr. McGowan and Mr. Coyle agreed to operate these grounds together?

A. It was at McGowan's, I am pretty sure.

Q. Was Mr. Coyle there too?

A. I can't remember; anyhow I spoke to Mr. McGowan to send for my license, whether it was at the cannery or not, I don't know.

Q. Was this agreement to operate these traps together in writing or verbally?

A. There was no writing needed.

Q. Was there one? A. No, sir. [325]

Q. It was just a talk? A. Yes, sir.

Q. Where were you when you had this talk?

A. If it was after we got the license, we had the talk about getting the men.

Q. Then you agreed you would operate these traps together? A. Yes—that is about the buoys.

Q. Was it agreed that you were to divide up the fish equally or was each man to take the fish he caught?

A. Each man was to take the fish that came in his net.

Q. And each was to pay one-third of the expense?

A. Yes, sir.

Q. Who was to pay the expense in the first instance—for instance in buying your net and getting the things ready requiring cash?

365

(Testimony of Erick Lindstrom.)

A. We had the money in the office, and Mr. McGowan and the bookkeeper sent for those things.

Q. But you had to get credit?

A. I had the money in the office.

Q. That was owing to you? A. Yes, sir.

Q. You started up business—bought new seines and got started? A. No.

Q. I mean two nets? A. Yes, sir, three.

Q. You had enough money owing you for that?

A. Yes, sir, we had enough money in the office.

Q. You say you at one time operated a set net on which location you got a ton and a half of fish a day?

A. Yes, sir.

Q. And since that time you quit and went to working for wages?

A. I did not hold the license; I was not in business myself; [326] I was with my brother Carl.

Q. Where?

A. Right across the river from Warrendale, called Wooder Creek.

Q. Were the nets in Wooder Creek?

A. No, sir, in the Columbia River.

Q. What is your brother doing now?

A. He is dead; he was drowned.

Q. What became of his set net locations?

A. The McGowans bought them; I suppose they had the ground leased, if I am not mistaken, my brother was operating the set nets.

Q. You were not operating yourself?

A. No, I was working with my brother.

Q. You were working for McGowan & Sons?

(Testimony of Erick Lindstrom.)

A. Yes, sir.

Q. And your brother owned the set net locations?

A. I cannot tell exactly whether my brother or McGowan.

Q. You don't know whether your brother was working for wages for McGowans?

A. He was working on shares.

Q. What sort of a place was this where you had those locations?

A. It was sort of an eddy along shore, and outside was the main stream.

Q. Now, sir, isn't it true that set nets can only be operated successfully in eddies?

A. Not necessarily; if you have a part of an eddy you can get out in the strong current.

Q. You must have part of an eddy?

A. Yes, sir.

Q. How long did you operate that set net with your brother? A. Three weeks.

Q. That is all the experience you had with set nets? [327]

A. I was set netting in the old country for a number of years.

Q. What country? A. Finland.

Q. What river? A. It is all rivers there.

Q. But what river was it that you were set netting in? A. In the Baltic Sea.

Q. What year did you come to this country?

A. 1888.

Q. What year were you born? A. 1867.

Q. Did you own a set net in the Baltic Sea?

(Testimony of Erick Lindstrom.)

A. I was with my father; I was in a boat with my father.

Q. And you came over when you were 21 years of age? A. Yes, sir.

Q. And the only experience you have had with set netting was three weeks in the Upper Columbia River? A. That is enough.

Q. Opposite Warrendale? A. Yes, sir.

Q. And that was the time in which you say there was no fishing in the lower Columbia River on account of the big strike?

A. That was the year 1896, yes, or 1906.

Q. And that was in the eddy?

A. Yes, but the current was running stronger on the outside of that net than it has ever run on Sand Island, but the inner side was an eddy.

Redirect Examination.

(Witness continuing:)

The launch that I spoke of as running from McGowan to Ilwaco was a cannery tender running only at the stage of high tide. It did not run at low water for the reason that there was [328] no water to speak of there—very little. That is the condition of the territory throughout there, it is all flats; most of it is up through the water; there is a little space one could wade across with gum boots on at low tide, in the lowest places; that is where there is least water.

The arrangment between McGowan, Coyle and myself was that we were to divide and apportion our expenses, and P. J. McGowan and Sons were to buy the fish at the market price.

(Testimony of Erick Lindstrom.)

Q. And it is a fact, isn't it, that they were furnishing the outfit in the first instance?

A. They were to, but we never got started.

Q. But that was the arrangement?

A. They were to send for it and have it on hand.

Q. They were to advance and provide the outfit?

A. Yes; any company generally does that.

Q. And they allowed you to do this?

A. Yes, sir.

Q. That was understood between you and your employers? A. Yes, sir.

(Witness continuing:)

P. J. McGowan and Sons is a corporation and but for the injunction suit in this action I would certainly have gone on and fished these locations.

Recross.

Q. Did you get any web for your net or web for any net which it was proposed to employ in operating any of these eight set nets?

A. It was just talked over, whether we would need it.

Q. And didn't you go and cut some of that web out? A. No, sir.

Q. You are sure of that? [329]

A. Not for that purpose; the buoys were taken out.

Q. You didn't cut out any web? A. No.

[Testimony of H. S. McGowan, for Defendants (Recalled).]

H. S. McGOWAN, one of the defendants, being recalled for further examination in answer to interrogatories propounded to him, testified as follows:
(Interrogated by Mr. DORR.)

I have heard part but not all of the testimony of the last two witnesses, defendants Coyle and Lindstrom. I heard that portion of their evidence referring to an arrangement they had with our firm concerning the locations and operation of these nets. I will state that whatever they did there and whatever they were preparing to do was with the knowledge and consent of our company. I allowed them to do this notwithstanding they were working for wages. There was no attempt on their part to do anything in the premises that would take any of their time that was not consented to by our company.

I remember the year 1896 which was referred to as the year of the big strike on the Columbia River. Fishing was going on all over the river all of that time during the fishing season. The strike probably made some difference because it disturbed the ordinary routine of operations, but the general fishing was going on. All the trap fishermen were operating in Bakers Bay as usual with the exception that they were operating under military protection from the State of Washington, and those gill net fishermen who felt disposed to take chances, and there were a good many, especially further up the river that operated, and they caught a good many fish in conse-

(Testimony of H. S. McGowan.)

quence, but our packing in the upper river was slightly increased that year, but not in a very great degree. I think our pack in 1896 in the upper river [330] might have been increased twenty or twenty-five per cent or thereabouts. We had a cannery in the upper river in the vicinity of Warrendale.

Cross-examination.

The gill netters that the union could not control were gill netting. I do not know how many there might have been; there might have been a thousand of them on the river. There are a couple of thousand on the river and there might have been half of them. I don't know whether half the gill net fishermen were fishing, but it brought into the fishing a lot of rough fellows who had not fished before. I think there was fifty boats out fishing during the strike on the lower Columbia River. The union patroled the river. A good many fish were delivered to Cook's cannery at Clifton, and I think that cannery operated during that time. I am not sure but I think they were getting lots of fish. I don't know whether the Astoria canneries were operating during the strike, I know we and Seaborg was. Seaborg was in Astoria. I think all the canneries in Astoria tried to run during that time.

Q. As a matter of fact you went to Coyle and suggested to him to get these licenses, didn't you?

A. I don't know that I went to him; we talked the matter over of fishing out there.

Q. You were the man who suggested it?

A. I do not know that I was the original suggestor;

(Testimony of H. S. McGowan.)

it was quite awhile ago.

Q. You cannot remember that far back?

A. I can remember that far back, but I don't remember the details.

Q. But I want to know whether you went to Coyle and suggested to him that it was an opportunity to get set net locations [331] upon Sand Island?

A. No, I don't know that I went to him; there was more or less discussion.

Q. A discussion that you were the unsuccessful bidder? A. I don't know about that.

Q. Or that the Columbia River Packers' Association had outbid you?

A. I don't know whether that was mentioned.

Q. Did you go to Lindstrom and suggest to him that now was the time to get set net locations?

A. I don't know that I did; I might have mentioned that we get that location.

Q. Don't you know that it is very doubtful or very unreasonable that he would suggest such a thing when he himself was working for you?

A. No, I have had men working for me who suggested going into a proposition to fish, lots of times.

Q. Your idea was that he would keep on working for you right along the same as he had done and you would hire him to operate the set nets?

A. The idea was he would run his nets.

Q. He would quit working for you?

A. He would necessarily have to, after he got ready to operate.

Q. Did you charge him with the fish license?

(Testimony of H. S. McGowan.)

A. The accounts I do not think have ever been fixed, so as to divide them.

Q. Did you charge them to him?

A. I do not know; I did not keep the records. We had an understanding that we would bear our expenses together.

Q. Was there any charge on your books, or P. J. McGowan and Company's, against Lindstrom or Coyle for expense of keeping these two men down there? [332] A. I don't know.

Q. You would not know that?

A. My idea is that when the matter is straightened out to do business, we would divide up all of our expenses.

Q. But two years has gone by and no charge on the books therefor? A. Well, I don't know.

Q. Not to your knowledge.

A. Not to my knowledge.

Q. You are president and general manager of the company? A. I am president.

Q. And general manager? A. In a way.

Q. You have charge practically of all of the books?

A. I have oversight of the business in a general way.

Q. That is the only business you have?

A. No; I have other business.

Q. Attending to P. J. McGowan and Sons' business? A. I have other business.

Q. What?

A. I look after a great deal of private business of my father, and one or two of his companies.

(Testimony of H. S. McGowan.)

Q. That all comes from the company, contained in the family?

A. It belongs to members of the family.

Q. It is all handled from one general place?

A. It is all done at the same place.

Q. And all by the same bookkeeper? A. No.

Q. Do you have different bookkeepers?

A. We have two parts of the office.

Q. Is it all under one head?

A. No; except in a general way I look after the whole thing. [333]

Q. You have no office at any other place than at the cannery?

A. We have an office at Ilwaco and one at Warrendale.

Q. That is your cannery? A. Yes, sir.

Q. It is all controlled from the head office?

A. The general policy is.

Q. Statements are made there at regular intervals?

A. Most of the fishing operations were at the Ilwaco office.

Q. But the Warrendale cannery business is all reported at the head office?

A. Yes, from time to time.

Q. According to your system? A. Yes.

Q. Up around Warrendale do you have many set nets in operation?

A. We have, I think, about three that belong to the company, and *and* there are a good many others who set nets up there at different places.

(Testimony of H. S. McGowan.)

Q. Have you operated them lately?

A. They operate them every year.

Thereupon, the defendants rested.

On November 10, 1910, the taking of testimony in rebuttal on the part of plaintiff was resumed. The respective counsel for the parties duly appeared pursuant to adjournment.

[Testimony of Christ Hansen, Jr., for Plaintiff (in Rebuttal).]

CHRIST HANSEN, Jr., a witness called on behalf of the plaintiff, after being first duly sworn, on oath testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.)

My name is Christ Hansen; I live at Chinook, Pacific County, State of Washington. Chinook is situated on the lower Columbia River, right across from Sand Island, probably [334] a distance of couple of miles. I have lived at Chinook for twelve years. My business is a fisherman. I have followed that business for twelve years. I have been fishing on traps for four years when I first came there, and since that I have fished with traps and seines both for eight years. I fished traps in Baker's Bay and seines on the south shore of Sand Island on the lower Columbia River.

Q. Have you had any experience in set net fishing?

A. What little set netting I have done, it is very little; I might have had a set net out to catch steelheads.

Q. Have you observed set net fishing?

(Testimony of Christ Hansen, Jr.)

A. I have seen it, but not a great deal of set net fishing.

(Witness continuing:)

I am acquainted with the location of all of the five sites on the south shore of Sand Island. I have fished on No. 5, and have also fished on No. 1. I leased No. 5 from the Government once, and also No. 1 at one time. Before I leased my ground from the Government, I was seining on the south shore of the island for two years. It was on the ground that Chris Olson took up, and I also seined on ground that belonged to Sankala and Tom Gavin. I operated seines during such time, and all of the lessees of the Government operated seines for catching fish on the south shore of the island.

I have been acquainted and familiar with Sand Island for the last twelve years.

Q. Where are set nets operated when they are operated?

To this question, counsel for defendants objected on the ground that the witness had not shown himself competent to testify.

A. There are so few set nets operated on the lower part of the river that as far as I know I am not very much familiar with them, but from what I have heard they are operated more or less [335] in eddies.

Q. Are there any operated in the waters of the Lower Columbia River in any of the currents or channels?

A. Not that I know of; I don't know of any set net locations there. If there were any set nets oper-

(Testimony of Christ Hansen, Jr.)

ated in the lower Columbia River, I would know it.

I saw a set net operated for steelheads in the Chinook River once, in near where we live, close by the island. I watched how they were worked, and I am familiar with the manner in which they are operated.

Q. Where are they operated with reference to the character of water and current and the like of that?

To this question, counsel for defendants objected on the ground that the witness has not shown himself competent to testify. By agreement between the respective counsel, it was agreed that the above objection should run to all of the above class of testimony from this witness.

A. The set nets I have seen operated on the lower Columbia River is along the Chinook beach. There have been set nets located there in the winter time for catching steelheads and that has been in shore and out, and some have been made fast way up on the shore and then fastened to trap piling out in the bay, and run up and down. There is no eddy there, but there is a little tide running one way or another.

(Witness continuing:)

The web used in set nets is the same as used in gill nets. I operated seines on the south shore of Sand Island for eight years, and I am acquainted with the current in front of the island, and I am also acquainted with gill nets and the manner of their operation.

I saw some of the buoys that McGowan, Lindstrom

(Testimony of Christ Hansen, Jr.)

and Coyle [336] placed in front of the south shore of Sand Island. So far as I understood it, they were placed by some other parties, by Stensland and a man by the name of Bussey. That was in the spring of 1908, sometime in the latter part of June. I should judge these buoys were about one hundred fathoms from the shore; I never measured them; that is my judgment, that is, one hundred fathoms from medium low tide.

Q. Supposing that a set net built accordingly as an ordinary gill net is constructed, were placed in front of Sites Two and Three, one end anchored at one of those buoys you saw out there, and suppose the buoys were only about one hundred feet from the shore and the net about three hundred feet long, and anchored to another buoy still further out from the shore, about three hundred feet out from the inside buoy, what effect would the current have on that set net?

A. Why, I should judge that most of the time the current would pull that net under. I have had lots of experience with that. We have been caught with a seine there, where we caught a snag, and had perhaps a couple of teams on the tail end holding it, and that seine would go under the water, cork, lines and all. You could only see it a little ways from the shore, and the balance would be under water.

A seine will catch a little more water than a gill net, of course. I have never seen a gill net caught down there.

Q. During what period or what time in a given

(Testimony of Christ Hansen, Jr.)

twelve hours would this net be covered with water or dragged under?

A. It would on Sites Two and Three from the first of the ebb, for about three hours it would be pretty hard for any gill nets to stand any way for fishing, and then it is a very little time until the tide turns there and comes back again with a pretty heavy current in shore and downstream outside, and at that time that current will not run quite as strong as [337] the ebb tide, but quite strong—strong enough to submerge the net, and then there would be a little slack on towards low water, and then in a little while on the first of the flood.

The time this slack water would be maintained depends upon the tides. There are tides that this water will stay slack for a little longer time than others. At other times, the tide would not stop for only about a half an hour or twenty minutes, or it might be an hour. The tides vary greatly there; it is according to the weather, storms and tides and things like that. You cannot figure on the tides along the island as you can further up. I should judge, a fair average time day in and day out, when the tide would be slack, would be between an hour and an hour and a half. That would be at low water. There would be a little time also on high water. At high water, I think the average would be an hour, something like that.

You get very little fish along the island at low water; we get most of our fish on the first of the flood. It is very few gill netters that pick up at low water,

(Testimony of Christ Hansen, Jr.)

but generally I know it has been flooding some when they get fish on low water. I should think that most of them if not picked up when they were caught, when they struck the net, the tide would be strong enough to tear them out of the net. I don't think that many could be saved unless they were picked up right there. There is quite a bit of current—quite strong; a strong current on the flood, too. There is no time when there is absolute slack water either on the top or at the bottom. Sometimes it will ebb pretty strong underneath and be flooding on top.

During the twelve years that I was fishing on Sand Island, I never knew of anyone attempting to employ set nets in front of the island other than those McGowan attempted to use.

Q. State whether or not in your judgment a set net placed where Mr. McGowan and these men, Lindstrom and Coyle, placed theirs, [338] or indicated where they would place them, would catch any salmon fish.

To this question, counsel for defendants objected on the ground that no sufficient foundation has been laid to entitle the witness to answer the question, and that he would be incompetent.

A. I think a set net at any place in the Columbia River would catch fish; I think they would catch fish.

Q. What do you mean by that?

A. I should think a man could put out a set net in the river anywhere the fish run and he would be able to catch fish.

Q. How many fish would he be liable to catch with

(Testimony of Christ Hansen, Jr.)

eight set nets in a season, in your judgment, carefully attended in every way, giving the best possible attention, operated by skilled men?

A. Before I answer that I must ask a question.

Q. Yes.

A. Do you mean if those set nets were fished for the term of the season?

Q. Yes; set nets three hundred feet long.

A. Fished for two months?

Q. Yes, anchored one buoy inside and one buoy out, fished properly by skilled men and attended to by skilled men, how many fish in your judgment, with proper set nets?

A. I would answer that this way: Whenever those set nets were put there to fish in the daytime, in the clear water, I doubt if they would catch any; that is in clear water in the daytime, I doubt if they would catch any fish. And if they were placed there in the night-time with clear water they would not do very much because they would be full of fire, and the fish would see that almost as well as in the daytime. By fire, I mean phosphorus. That acts like fire on the net. And if it was muddy water they would perhaps catch a few fish [339] in the daytime, if they were attended to and picked up on the slack tides, on low and high water, and perhaps the same in the night-time, if they were to pick them out. If they had a set net for big salmon and a spring tide came, he would be likely to get out, because steelheads will do it, and I think the salmon would do it outside of Sand Island in that current.

(Testimony of Christ Hansen, Jr.)

Q. About how many fish do you think these eight set nets would catch?

A. That is hard to say; it has not been tried.

Q. But I would like to have your judgment as to whether it would catch enough to salt down for one family for a year, and not a big Roosevelt family either?

A. My judgment would be that if I had those set net locations and fished them for my own use, I do not think it would pay me to fish them at all. So I cannot say any amount of fish to be caught.

Q. Do you think they would catch any fish at all hardly, to amount to anything; would they catch a ton?

A. That is pretty hard to say; I don't think they would really.

Q. Is there any other reason why they would not catch fish; could they be maintained; could the nets be maintained at those places during the fishing season? A. No, I don't think they could.

Q. Why?

A. Because there are so many gill netters along there, along that island, who come in the night-time and drift back and forth, hundreds of them, along the outside of that island. I don't see how they could be maintained amongst those gill netters.

Q. What do you mean by that; explain that?

A. The gill netters will certainly drift by those locations, and **[340]** another on top of him, and another on top of him again, and their nets would get all tangled up, and you can imagine what would

(Testimony of Christ Hansen, Jr.)

become of that; they would not stand it.

Q. You mean that the gill netters drifting up and down that channel there, with their nets, would drift on top of those buoys?

A. Yes, on those set net locations, that is to where they were made fast, and also to the nets.

Q. And you say there are hundreds of gill nets habitually drifting up and down that place where those set nets are? A. Yes, sir.

Q. And how long do those gill netters use that ground as a gill netting ground?

A. They use it from the opening of the season until the end of the season; they are gill netting there all season through more or less, but the middle and latter part of the season most. It is rough water down that way and they will not risk it early in the spring; but there are some there just the same.

Cross-examination.

(Interrogated by Mr. DORR.)

The steelhead I spoke of is a certain kind of fish that we are catching down on that part of the river similar to a salmon, and they are classed with salmon. They look like a salmon, but are generally smaller than a salmon. The average is smaller than that of a Chinook salmon. In the spring, their average weight is from 8 to 12 pounds, something like that, 12 or 14 pounds; in the latter part of the season, they will average more, and some go as high as 30 or 35 pounds. They run about like salmon, although there are not so many of the big ones. Chinook salmon will go as high as 70 pounds, I think, but

(Testimony of Christ Hansen, Jr.)

those are very rare, but you get lots of them at 40 and 50 pounds. Sometimes the run of fish will average small and sometimes bigger. The **[341]** Chinook salmon run all the way from 10 pounds up to 70 pounds, not many up to 70 pounds, as I have said before. There is not an awful lot of these steelheads that will run 35 pounds either. I should judge the steelheads average 16 pounds the whole year around. I should judge that steelheads are not as abundant in the river as Chinook salmon. The proportion of fish that would be steelheads as compared with Chinook salmon differs in different years; some years it would be perhaps a quarter and some years a little more.

Another variety of salmon in the river is called "bluebacks." They average from 4 to 5 pounds. I think these are the three fishes that we figure on catching. There are also silverside salmon down there in the fall of the year. They run as high as ten pounds, I guess. Some years there are quite a few and some years not so many. They are also fished for. The set nets I observed were operated off shore from the town of Chinook. I should judge, there are a half dozen, or something like that, operated each year. They are put out after Christmas, in January and up to the close of the winter season, and they are generally fishing for steelheads. These fish gill the same as other salmon. They are small set nets, most of them along the Chinook beach are operated by small boys, young boys; they couldn't be very long; say 12 or 14 to 20 fathoms, just pieces

(Testimony of Christ Hansen, Jr.)

of shallow gill nets. They are made specially, most of them; they are a small fish net, with lead and cork line, and anchored at each end, and fastened to the shore, or off shore, so long as they are fastened at each end.

We operated seines on Sand Island at almost all stages of the tide, excepting when it is running strong. We operated in high water and up to two or three hours on the ebb and then quit for awhile and start in close to low water and seine as long as we can on the flood. If the weather is good, we could seine **[342]** probably some days perhaps five hours and sometimes six and sometimes more, differing in different days, and according to the tides. We cannot seine on a strong tide. In laying these seines out, we go out in the track of the gill netters that drift down there; they come down every day, and get tangled up with the seines a good many times, and we have lots of trouble with gill netters. If it was not for them, we would catch lots of fish in the seines. We have to look out for them. When they come, we have to get out of the way it seems to me; I always do. I tried to lay out there between them when I can. There is no eddy in front of Chinook. The tide is not so strong. Chinook is laying inside of Sand Island. I am not sure but it is two miles. The tide ebbs and flows there. The current is not very swift there; it is very seldom so swift but what the corks will show at any time, either ebb or flood; it is not swift enough to take the net under water. I am sure of that, that is, where

(Testimony of Christ Hansen, Jr.)

they place the nets. If they placed them further out of course they would but where they place them pretty close to the shore, most of them make them fast on the shore. They catch steelheads there not a great deal; sometimes two or three per day, and sometimes they fish a day or two and don't catch any; sometimes four and five in one night; very little in the daytime. They are not out of the track of the fish; of course, steelheads run close in shore. They see the net in the daytime and don't gill as they do in the night.

The character of the water around Sand Island depends upon the time. In July and August, this year, it was clear water pretty near both of those months. I think there was a little muddy water in July, but very little. We had more muddy water in 1908, and I think in 1909 through in July. Of course, August is nearly always clear, except in years when there are cloudbursts. We hardly ever have any clear water until about **[343]** the first of July, sometimes not until the middle of July. Every year has some clear water; the flood tide is nearly always clear. We have no years when we have muddy water all summer. Phosphorus comes only when the water is clear. Perhaps the moon has something to do with it, but when the water is salty and clear, it is fiery when you put your oar down or anything in the water, it is like fire. It is more in some portions of the month than others.

At the time I saw the buoys out there, they were placed up and down along; I have not ascertained

(Testimony of Christ Hansen, Jr.)

just how many. I had not got out of the island with my seining outfit at that time. I was looking over my grounds and saw them placed a little ways out from the shore, I thought about 100 fathoms or 75 fathoms. They were all below low tide. I do not remember the time when I first saw them. I saw Iver Stensland and Bussey there in a boat one day. They were around the buoys; it looked to me like they were working with them. I could not say whether these buoys had license numbers on them or not. I never was out to them. I am not sure about the time I saw them, whether in the month of June or July. It was before the Columbia River Packers' Association came down there. I never saw any set nets operated in front of that island before; neither did I ever see any traps there. Traps were down further in the Oklahoma Channel, but they are now covered with sand and in the island proper. I was seining on my own accord. I had no relation whatever with the Columbia River Packers' Association, but I was selling my fish to the Columbia River Packers' Association, and they were not interested with me in any manner. They furnished me some gear and capital; I don't remember if they were furnishing me. One year I ordered gear through them for my seines through Mr. Hawkins. **[344]**

Redirect Examination.

(Interrogated by Mr. FULTON.)

Steelheads will not ordinarily gill in ordinary gill nets; the fish are too small. When I speak of the average salmon, I had reference to salmon caught in

(Testimony of Christ Hansen, Jr.)

seines. So far as I know, I have not operated a gill net, but I have heard that they do not catch many steelheads for the above reason.

[Testimony of Jens Nielson, for Plaintiff (in Rebuttal).]

JENS NIELSON a witness called on behalf of the plaintiff, after being first duly sworn, on oath testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.)

I live at Astoria, Oregon. I first came there in 1884. I have lived there over 21 years—since 1888. When I first came there, I started in fishing, then I left and came back again. I am fishing in the summer and doing carpenter work in the winter most of the time. I have been fishing since 1884 on the Columbia River from Rainier down to the mouth of the river. During that time, I have been operating a gill-net, except one fall when I fished for about a month operating a fish-trap, but I didn't get any fish in it. I have tried operating set nets up in the river near Rainier and Mt. Coffman. I went up there in the spring, started the first of April and stayed up there generally during April. I did this for four or five years. Later years, if I did not get any fish at first, I went right back. I have had occasion to examine into the manner in which set nets are operated and can be operated. I have tried to operate myself and saw others, and I tried every year for four or five years, and I gave it a good fair trial. My operations were confined to the waters of

(Testimony of Jens Nielson.)

the Columbia River, in the vicinity of Rainier, and a little below Rainier. **[345]**

Set nets, where they are operated successfully, so far as I could see, was in eddies, where there is sharp points coming out with the strong current, and forces the water out, and that makes an eddy. In 15 or 20 fathoms of eddy, the net would stand there all the time and get fish, but mostly steelheads, but I could not get into the eddies, because they were all taken. I tried it between the snags, but I couldn't get any, because if they got in, the current took them away. I set many nets, but I didn't succeed. In a strong current, the net will go under the water, or if it comes lengthwise, it will draw up, so that it lays flat and the fish don't gill, if you have a strong current. I tried set nets around there where there were snags, but I couldn't catch fish. I don't know the reason; there was muddy water in the daytime, but I couldn't get any.

I have also operated gill nets in the Columbia River, and the ordinary size of the mesh of such nets range from seven and one-half to nine and one-half inches, and some have nine and three-fourths inches. In the spring-time when the fish are small, the average mesh is about seven and three-eighths to eight inches. The majority, however, I think are about nine and one-fourth inches. These gill nets are about two hundred and forty to two hundred and sixty fathoms in length. Out in front of Astoria, on the flats, they make them a little longer; they don't go much below two hundred and forty fathoms.

(Testimony of Jens Nielson.)

The cork line is the rope on which is strung wooden corks, which float the net, and on the other side of the net is a rope on which is welded or molded lead, and this keeps the net practically upright.

The principal drift on the lower Columbia River is along the south shore of Sand Island, and gill nets up to two thousand in number ordinarily use that drift every year.

The way gill nets are operated there is, they are generally laid out from deep water to the bank. There might be one strikes **[346]** something, and another will come and they will swing together, but generally they have a little distance between them. They are laid out, of course, according to the tide; they drift on the beach called Coyote beach. They lay out a short piece and drift down and take her up and go back. This is generally done in the spring-time. The length of the drift ordinarily employed is about a couple of miles along the island. There are at least five hundred or six hundred boats every day along that island and at night-time.

I am familiar with Sand Island, but I am not exactly familiar with the number of the sites. I have never examined the numbers on the ground, but I am familiar with the ground, and have been familiar with it since 1884. I fished there every season. I know the location that the Columbia River Packers' Association seined on at Sand Island during the years 1908, 1909 and 1910. I saw some buoys that were put out there in front of such seining grounds in 1908. The first time I came to know they were

(Testimony of Jens Nielson.)

there, I went down in the evening and came out with my net, and got fast to them and lost thirty or forty dollars' worth of net on those buoys. I started in a strong current and went in and struck those buoys. Of course, I did not know what it was; the net started to rip, and I got fast, and they tore off. I went a little further up and got in again, and another fellow got on top of me and we dragged together up to the lights, that is the lower lights, and then they tore loose, and I lost about one hundred dollars. I went back and only saw a few seine nets and some corks. I saw we were fastened to the buoys, and I spoke to some of the others about it, and we thought of getting out a petition to the Government to remove them, and we would have to remove them, but I thought the Packers would start seining and would see them and remove them. If the Columbia River Packers' Association had not removed them, of course, we would have to remove **[347]** them, because lots of fellows lost nets there. At the time I met with this accident, my gill net was about two hundred and forty fathoms in length and about four and one-half fathoms from top to bottom. When our gill nets came in contact with these buoys the corks went under water; of course, the strong current had hold of my net. I could not get rid of the buoys; my net took them all down; it was on the strong flood tide, and we always go into the beach to swing the net against the bank. My entire net went under so far as I could see; of course, it was dark. It would almost take the whole thing under. The

(Testimony of Jens Nielson.)

force of the current sunk my corks and net almost to the bottom, so that I could not see what I had run up against.

Q. Supposing a set net 300 feet long was placed in front of Sand Island where the defendants' set nets were placed, anchored at each end to the buoys that were there, state what the current would do, what effect the current would have upon a set net so located?

A. According to the tide; at times it would take it under water most of the time. If it stood lengthwise the meshes would go flat, and crosswise it would not fish. In order to fish it would have to be across the current, and if it was laid parallel with the current it would not gill the fish. Most of the time the corks would be down under the water, and the meshes of the net would be taut, and I don't get any fish that way, except at a snag. I have tried it in there in the daytime in the bay, and never could get any fish. There are lots of gill nets laid out along the beach, because there is no tide, but they never get fish. If we could, we would be lying there all the time. Fish will run at low water, but not in the dead tide. In slack water, they will run in deep water, because there is always a current; when it is flooding on top, there is a strong current underneath, but in the dead water, the fish stand **[348]** still; they don't run, even if they touch the net they will not gill; they will stand there. I don't think a set net there would catch fish at low slack; I don't think a set net would catch fish there at any time. I have

(Testimony of Jens Nielson.)

been trying it in all ways. I have seen the seine haul them in by the ton, but I could not catch anything in the net.

Q. What effect would a strong tide have upon the fish that would happen to be gilled in a set net in this location? A. It would tear them out.

Q. Why do you say that?

A. I can prove that. There is a wreck called the "Republic," it contains thirty fathoms between the two side wheels; you can see the nets across there, but I don't think a man ever saw a fish in them; I have looked lots of times but never saw a fish in them yet; if there is a fish in it, it is a flounder.

Q. Are you familiar with the value of sites on the Columbia River?

A. If a man has set net location—you cannot get them, because he uses it mostly for winter fishing for steelheads.

Q. Do you know what they are worth?

A. No, I never asked.

Q. Well for spring or salmon fishing?

A. I never got much spring salmon in a set net. I only know of one fish caught in a set net that was in front of the cannery; they most get steelheads, if anything.

Q. Well, whether steelheads or bluebacks or salmon, what would be the value of those premises in front of sites *were* the Columbia River Packers' Association was operating seines in 1908, 1909 and 1910 for set nets?

(Testimony of Jens Nielson.)

A. I don't think they were worth anything; I would not buy them; I could make set nets out of gill nets, but they would not catch fish; it would not be worth anything in my judgment, if I had all the privilege there I wished. **[349]** I don't believe it would catch any fish. If I did have a set net, I don't think it would stay, because the gill nets come right over it, and I do not believe a set net would catch any fish even if the gill nets did not go over it.

The average weight of a salmon caught by gill nets is 22½ pounds or 23 pounds, take it right through the whole season. Gill nets, say 7¾ mesh, will catch a fish 11 pounds, mostly 12½ to 15 pounds and up to 18 and 20 pounds. The ordinary gill nets never catch fish weighing less than 18 pounds; they might get one weighing fifteen pounds, but that is seldom.

My experience in the last twenty years fishing on the Columbia River is that I very seldom catch steelheads in a gill net. I don't think I have had 300 pounds of steelheads when I had ten to fifteen or eighteen tons of salmon fish in a year.

I have never known of any set nets being operated in the vicinity of Sand Island. The only fishing gear operated on that shore, to my knowledge, has been seines and gill nets. Once many years ago, someone started to drive a trap, but as fast as they drove the piles the fishermen pulled them out. They drove some back of the "Republic," but it filled up dry with sand. They fished that one season, and I think that is about all. I would not say what fish they caught.

(Testimony of Jens Nielson.)

Cross-examination.

(Interrogated by Mr. DORR.)

The average length of gill nets used on the Columbia River is from 240 to 260 fathoms, and about four to four and one-half fathoms in depth. The net does not go straight down, because it is weighted heavy enough. What I meant by swinging the bank is that we start in deep water and go to the bank; we pull right up around the bank, and we let the net swing against the bank, and the fish start and go around and get into the net and gill. That is what I was doing when I got tangled in these buoys. I started **[350]** in deep water and pulled into the beach, that is, pretty close to it, as shallow as I could navigate my boat. When it is smooth, we get pretty close, and we swing a buoy on to the beach and pull out, and let it drag down the beach.

Both Oregon and Washington licenses are good on the river for gill net fishing. I said there was one thousand drift nets in that vicinity; there are more than that when we fish all over the river, but there I would say, in the latter part of the season. In May there are five or six hundred; and in the months of August and July, there may be one thousand boats, with two men to a boat generally; sometimes a man might go with a skiff and drift along. I say the cost of these gill nets, if a man had to pay for all labor, he would not start out fishing in the spring with a net for less than four hundred dollars. If he bought the net, all new twine, it would cost him about $400.00. The average catch is from four to five tons. I said

(Testimony of Jens Nielson.)

that I caught twelve tons, but that is not the general average. I am one of the highest. I used to be the highest, except the last two years. A fair average would be not more than three or four tons, but I get three or four times as much as the average. The boat investment is entirely separate. When new, a bare boat costs $225.00. My boat cost me $250.00; that was a sailing boat. With the sailing boat, the investment stands about $650.00. Gasoline boats cost $500.00. I have been speaking of Columbia River sailing boats. Sometimes a gasoline boat is the best; they are easier to work. I don't know that they will catch any more fish, but it is much easier to get home with.

I was fishing with set nets down abreast of Mt. Cauffman; that is just below Rainier. I fished there four or five years, and I usually operated two set nets, but sometimes when I saw I did not get anything, I did not attend to them, and while I was operating set nets, I was also operating gill nets. When you set [351] net, you leave it on the slack tide, you don't need to stay with it and watch it. Between times, I gill netted. I gill netted at night; you cannot catch fish in the daytime when the water is clear. In the daytime I sleep and mend nets and so forth. This is the custom when the water is clear. I mean to say that you cannot catch fish with a gill net in the daytime when the water is clear. We do have this phosphorus to contend with at night, but it is not present at all times. It occurs mostly when there is a southerly wind; and after the wind comes when there

(Testimony of Jens Nielson.)

is rain and fog, you don't see it, and in the latter part of the season you don't see it, as I have noticed. The full moon has something to do with it. It occurs at full moon when there is a strong flood. Of course, it don't occur in fresh water; only occurs in salt water. It occurs around Sand Island when the river is low, and in strong flood, when the water is salty, and its extent up the river depends entirely upon the state of the river. In the spring, we have no flood up where I was set netting. It might back up but never flood the net up river. I caught no fish with my set nets, although I worked four seasons at it. The reason I kept it was I got fish with my gill net in April. I never caught any fish with a set net. I had plenty of net, and I would try it to see if I could not catch them a little easier. I went and looked at my set nets every day when I had them out. I thought there might be one, but never got any. I did get one down abreast of the town. It might have been a little later that I got this. I generally tried it, but I did not get any, because I could not get into the eddies; they were all taken up. People operating set nets in eddies got steelheads; some days they would get some and some not. They would set their nets out and they stayed there. Of course, they attended to them. The current was always slack in the eddy, and there was no flood, that is, so long as the net was not too long. [352] The only place you can fish with a set net is in an eddy.

Q. When you do set them in an eddy, it is impossi-

(Testimony of Jens Nielson.)

ble to catch any, because the fish don't gill unless there is a current?

A. Well, the eddy is different from the current.

Q. But you have explained that fish won't go into a set net unless there is a current; that they won't gill?

A. Well, an eddy, or eddy water is quite different; there is no tide. Where there is an eddy the nets stand in the eddy, and the fish want to go clear of the strong tide and they go in the eddy. The steelheads will follow the eddy. They are different from salmon.

Q. Will the steelheads or any other fish go into a gill net where there is no current? A. No.

Q. Then they won't get in in an eddy?

A. Yes, that is not dead water; that is always running.

Q. You didn't try it in an eddy?

A. No, I couldn't get in.

Q. The difference between an eddy and the current is that it runs in a circle?

A. The current strikes a rock and comes back and out again, and the net is right in the eddy.

Q. So that there is a current all the time?

A. Yes, sir.

Q. Did I understand you to say *something a* set net down at the "Republic" wreck?

A. They are in the line, and get onto that wreck. That is like a snag, and it is an old steamer that was wrecked; that tears the lines.

Q. I thought you said there was a set net there.

(Testimony of Jens Nielson.)

A. I said they will stand there like a set net, and then the next tide turns and tears them away. But you can find them when it is like a set net over the wheels. [353]

Q. Then your idea is that the gill net fishermen would not allow these set nets to be operated in front of Sand Island? A. I don't think they would.

Q. They would take them out by force?

A. We intended to sign a petition to the Government and remove them from navigable water, because they were in our drift. I went along there with the tide. If I had had money, I would have sued McGowan, but I didn't have it.

Q. Where did the fishermen pull the piles out as fast as they were driven in; did they have a permit?

A. Well, that was so long ago, I don't remember. Those men are dead and gone now. They tied ropes on and pulled them away. I don't know who did it; I could not say; that was many years ago.

Q. They turned the pile-driver adrift, did they?

A. Oh, no.

Q. How wide is the river at this place from Sand Island to the other shore?

A. I suppose four miles; some places six miles.

Q. They drift all over the river?

A. Mostly; that is where they go; in the strong current they cannot drift in the deep water.

Q. It is not absolutely necessary for them to drift into Sand Island beach?

A. That is the only place they can drift on strong current; that is the only place. If in a strong cur-

(Testimony of Jens Nielson.)

rent, you were out in the deep water, you would be outside the bar in fifteen minutes.

Q. What kind of a current is it along the island?

A. There is quite a current but we don't use much net; just a few fathoms; take half an hour to drift a couple of miles; and then pick up and go back.

Q. How far is it from there to the bar? [354]

A. To the mouth of the river, it might be three or four miles.

Q. How far out do you go fishing with a drift net?

A. In the latter part of the season we often find it calm water and go pretty well out to the bar; some go out just for the sport. If it is rough, of course, they never go out there; they never go further than Sand Island.

Q. Sand Island is about the limit?

A. Yes, until the latter part of the season.

Q. How far up the river do they go?

A. I think right up to the Dalles; I can't say; up to Rooster Rock.

Q. Up above the Cascade Rapids?

A. I have never been above Rainier.

Q. How far is that?

A. About sixty miles; forty-five or fifty, along there.

Q. What is the difference in the current up at Rainier?

A. The current runs down all the time, quite a strong current in the spring; I cannot say later in the season.

Q. You were there in April?

(Testimony of Jens Nielson.)

A. Yes, we used to.

Q. What is the strength of that current up there?

A. I cannot answer that.

Q. Is it swift and rapid or slack and slow?

A. It is a strong current; in some places the sailing boats cannot make headway.

Q. Is it as strong as in the main river between Sand Island and Astoria?

A. Yes, in certain places. There were many who did not like to go there because it was full of trees, but I did, and that is the reason I got a good many fish. [355]

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. The places where you had your set nets in the vicinity of Rainier, how did the current there compare with the current in front of Sand Island where these buoys were?

A. That is quite different. There was a kind of a tide but in the spring I set in between some old tree stumps; sometimes there was a kind of an eddy behind the tree.

Q. That is where you set your net, the current was not very strong?

A. Not very, although sometimes it was.

Q. How would that current compare with the current where these buoys were put?

A. I could not compare them.

Q. Which was the swiftest?

A. It was swifter at Sand Island, that is, at certain time of the tide.

(Witness excused.)

[Testimony of John Ostervold, for Plaintiff (in Rebuttal).]

JOHN OSTERVOLD, a witness called on behalf of plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is John Ostervold; I live mostly about two miles above Clifton, in the Columbia River. I have been acquainted with the Columbia River since 1881. My business is fishing. I have followed this business all my life; ever since I have come to the Columbia River. I have fished on the Columbia River since 1881 with all kinds of gear. I fished with gill nets around Sand Island, and have operated set nets around Bugley Hole and Locaman and all along the river. I have also followed [**356**] seining. I have a seining ground of my own. I have been seining since 1887, and have been seining for the last sixteen years on the Columbia River. I engaged in set netting for the period of ten years, first from 1884, when I located on Puget Sound, ten years set netting off and on, every winter. I have given the matter a very thorough study, and have investigated how other people operated set nets. So far as my experience goes and that of others, set nets can only be operated successfully in an eddy, the length of the net to fit the eddy. If you have too short a net, it will not fish good, or if you have too long a net, it will not fish good; the net must fit the eddy. The eddy I speak of is formed by a promontory from the shore, and it cuts

(Testimony of John Ostervold.)

the current and makes a whirl, or back whirl, next to the shore, and follows down along the rip. Sometimes you can put up three or four nets in one eddy, the closer to the rocks you are, the shorter the net; if you get fifty feet further down, you could put twice as long a net down, and still longer further down. Of course the eddy dies as you get further down. Sometimes the lower net may do best and sometimes the upper. The reason a set net cannot be successfully fished in any other place, is because in the eddy the current is always live and it keeps flapping the net back and forth; more so in an upper eddy, and still less in the lower one; that stands the steadiest. The reason why you cannot successfully operate a set net in a straight current is, because there is no eddy there; the current is too strong; there is no slack water.

Q. Then if you were to take a set net down where the tide ebbs and flows, there is always a slack water at both low and high; can a set net be successfully operated there?

A. On the slack, it would be so short a time you would not have time to handle your net, before it would turn again. You must take your fish and wash your nets or it will spoil in [357] about two weeks. I am familiar with Sand Island and have gill netted there.

Q. Can a set net be operated in front of Sand Island about the middle portion of it, the inside portion of the net being 50 or 100 feet from the shore, and the outside at whatever length they wanted?

(Testimony of John Ostervold.)

A. Not in my days; I have not been there since 1893. I have heard the testimony of Mr. Nielson and heard his description of the current at Sand Island, and I heard him describing the island as it is to-day From his testimony, in my judgment, set nets could not be operated successfully there. It must have its own way of doing the work, coming and going. If you had bridles at each end in a hammock net, right in the strong current, it would bring the lead and cork line together. If you had a lot of rock tied at the bottom to the lead line, it would lay over that way with one tide, and over this way with the flood tide, that is, the cork line would go down to the bottom of the flood and down the other way on the ebb tide. At low-water slack, it would probably catch a fish or two, if you could spare the time looking after the net. Fish run at times at low slack. Salmon generally come outside on slack water. If a set net were located within 400 feet of the shore of Sand Island, they would probably catch a few salmon. I think they run that close to the shore, but I think that at slack water is the time that they must fix the net.

Q. From the description you heard by Mr. Nielson of this location down there, what would be the value of that location for set net purposes?

Mr. DORR.—That is objected to as incompetent, and no foundation laid.

A. I would not give five cents for any such location without an [358] eddy; it is not worth it.

Q. Referring to slack water, you say that a set net down there in front of Sand Island might catch some

(Testimony of John Ostervold.)

fish, but that would be the time you would have to take it up? A. Yes.

Q. Otherwise you would have no opportunity to pick it up? A. Yes.

Q. And therefore you could not catch any fish as a matter of fact? A. I think that is true.

Cross-examination.

(Interrogated by Mr. DORR.)

I have never been over on Pillar; the piles are too close together there. I have heard about it. They drive piles and stretch nets between the piles and hang them slack, but I was never there, only what I have heard. I have heard it is a swift current and shallow water, and that they drive piles about every six feet, and then it is practical to catch fish where there is some current, if you fix them like that, have the right kind of protection, so that the current does not keep them too tight, and put suitable sticks on the net, to keep the web in proper place and to keep the current from getting too much strain on it, and you must not have them too far apart. This, of course, is regulated by the swiftness of the current.

I have fished on Sand Island with a gill net. My business now is seining, and I sell my fish to the Columbia River Packers' Association. I am independent; Columbia River Packers' Association is not interested with me; they are backing me. They furnish me the gear. I am operating the seining ground on the lower end of Puget Island, abreast of Cathlamet, about 33 miles up the river from Sand Island. I am operating in the State of Washington. The set

(Testimony of John Ostervold.)

netting in eddies is mostly in Oregon, in the vicinity of Jim Crow Point. There are perhaps two thousand [359] set nets in those eddies, but I have quit. They still operate there; they also operate some traps. The set nets are mostly operated in the winter. They don't operate in the summer, because they can't get the Chinook salmon up into those small eddies.

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. In your judgment could a set net be successfully operated down there in Sand Island regardless of how it was constructed, even if piles were driven?

A. I don't think piles would do any good there; it is too swift and too deep. I can't imagine any way to construct a net to be successful on Sand Island.

Q. Suppose they put it down in ten or fifteen feet of water close to the shore?

A. If the fish went like that, they might be caught by scoop net perhaps.

Q. But could it be operated successfully with a set net? A. No; the fish don't go that close in.

Q. Then you say the set nets you know of on the Columbia River do not catch salmon at all, but simply steelheads?

A. Yes, sir; I never saw them catching any Chinook salmon to amount to anything. They might get one, but very seldom. I have never been up the river around The Dalles or Warrendale.

[Testimony of M. Lugnet, for Plaintiff (in Rebuttal).]

M. LUGNET, a witness called on behalf of plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is M. Lugnet; I live at Ilwaco, Washington. I came to Ilwaco in 1883. I have lived in Pacific County in the State of Washington for the last 27 years. First I was engaged [360] in fishing, and then I went and took up a homestead, and then I have been logging, and fishing again of late years. I was rafting and have done carpenter work in the last summer. All the fishing I have done was gill netting. I fished four seasons, then I was away for six or seven years, and then fished three seasons again, then was away again, and then fished four seasons, making twelve in all on the Columbia River. My fishing operations extended all over from opposite the bar up to Moglers Station, abreast of the City of Astoria, and I have been successful. At first I fished most on the north side of Sand Island, and on the south side some, but seldom. Of late years, I never set my net on the north side at all, but on the south side. I could not tell how near the shore; anyway I could get my net; there were so many nets I had a hard time to get my net out. I could not tell how many nets habitually fish the waters of the lower Columbia River, in the vicinity of Sand Island. It looks to me there were lots of them. You could walk from one boat to another almost across the river.

(Testimony of M. Lugnet.)

I am acquainted with the place where the Columbia River Packers' Association seined on Sand Island during the years 1908, 1909 and 1910. I heard that they leased it from the Government. I know about where it is; I saw them there. I saw these buoys that McGowan, Lindstrom and Coyle put in front of the Columbia River Packers' Association's grounds. There were some stakes hanging up there; I do not know what they were or who put them there; I saw them there, in 1908. I could not say how many there were; I never counted them, but I saw three or four, something like that. I saw them on ebb tide. The buoys were floating at that time. If they had not been floating, I could not have seen them. I did not see them at a strong tide; I never got hung up on them.

Q. How were they placed with reference to the locations where [361] the gill netters drifted?

A. The gill netters that I saw when I was there the last four years, I thought I had laid my net where I had a chance to get my full net out.

Q. Was it in the drift ordinarily employed by gill netters?

A. They were supposed to be gill netting, drifting with the tide.

Q. And was that in the drift where these buoys were?

A. Well, they might drift on them, although I never did.

Q. Would you say it was in the drift, these buoys;

(Testimony of M. Lugnet.)

were they in the path where the gill netters habitually drifted?

A. There were lots of gill netters drifting close to the shore when there was a strong tide especially.

Q. Do you know anything about set nets?

A. No, sir. Well, I know something but not on the Columbia River; I was fishing for Mr. McGowan on the North River in '87, set netting.

Q. Well, that would qualify you here as an expert. How long did you fish set nets on the North River?

A. About four weeks.

Q. Now, are you acquainted with the current in front of Sand Island where these buoys were located?

A. Well, I ought to know; I have been there often; it don't run always alike, hardly two days or two tides alike.

Q. Now, supposing that a set net were attached to those buoys that were there, one end on the inside buoy and one on the outside buoy, what effect would the current have on that set net?

A. If it was setting across the river, it would be across the current, and if tied they might stay there and they might not.

Q. What effect would the current have on the net?

A. If they were hung on the buoys and tied up from 10 feet, and used heavy rocks on the bottom, they would be up and down for awhile, but if there is an anchor on the bottom, they will get [362] under further in a strong current. If they are hung up on cork line, it might take the lead line up off the bottom.

(Testimony of M. Lugnet.)

Q. If the lead line was weighed down with rock and those buoys you saw on top, would those buoys go under water?

A. Yes, the buoys were on top of the water.

Q. And would the current take the buoys and cork line underneath the water?

A. If they were tied on one end, it would take them down.

Q. What effect would that have upon fish that happened to be gilled there?

A. I hardly ever got any fish when I snagged my net. When they got hung up, it would generally take the fish out.

Q. Do the fish run along the shore there at low slack?

A. You fish almost all the time; you have a chance except in a very strong tide.

Q. But will salmon run in that close to the shore at low slack?

A. We generally fish in a deeper water in a slack tide.

Q. What is the reason for that?

A. We can make our nets stand better.

Q. Can you catch fish close to the shore?

A. Sometimes, it is pretty hard to tell. When there is fish, you can catch them most anyway, and when there is no fish, you cannot catch them anyway.

Cross-examination.

(By Mr. DORR.)

My idea is that when there is no fish, you cannot catch them, of course. I was on North River in

(Testimony of M. Lugnet.)

1887. I was then working for Charles McGowan and the old man. I was drift netting first and then set netting. They have a pretty good current over there, but I set my net pretty close to the shore, on the low side. I drove piling there ten or twelve feet apart, and hung the line on, and then hung the net on that, and put heavy rocks on the lead line.

Q. What is the strength of that current in the North River as compared with the current off Sand Island where these buoys [363] were?

A. I could not judge of that.

Q. It is a good deal stronger in the North River?

A. I believe on the ebb tide it is stronger on the Columbia River than on the North River.

Q. How about the flood?

A. Well, on the flood too, except on a slack tide.

Q. Are you speaking of the main river or inshore along Sand Island?

A. The way the current is there on the first tide from the time it runs very close to the shore, and then after a little it keeps working out and is stronger outside and not quite as strong along the shore.

Q. Are you acquainted with the other localities over at Willapa where they use set nets?

A. I have never been set netting there. I fished there but not set net there since 1887.

Q. Have you seen set nets there?

A. I have seen them but have not been right where they were.

Q. How many set nets did you have?

A. I had two little pieces in the North River.

(Testimony of M. Lugnet.)

Q. How long?

A. One 15 fathom and another probably 30 fathom, 25 or 30.

Q. Why didn't you have them longer?

A. That was all the net we had at that time.

Q. You were operating two nets yourself on the North River?

A. The nets belonged to Mr. McGowan; I was fishing for them.

Q. And you were tending the nets? A. Yes, sir.

Q. Was anyone with you?

A. No, I was fishing alone.

Q. Did you catch any fish? [364] A. Yes, sir.

Q. How many?

A. I could not tell; sometimes 100 fish a day.

Q. And you operated them four weeks?

A. Yes, sir.

Q. Were there any other set nets in the immediate vicinity?

A. There were lots of set nets that year there.

Q. Did the others catch fish? A. Yes, sir.

Q. As many or more than you did?

A. Oh, yes; William Anderson had a set net there across the river below me and caught a whole lot. He claimed he got twelve hundred dollars' worth of fish in one set net; that is what they said.

Q. That was the common report? A. Yes, sir.

Q. And was his set net constructed like yours?

A. No, he had it different. He put it clear across the river and put big planks for buoys and hung his net on that line.

(Testimony of M. Lugnet.)

Q. How wide is the river there?

A. I could not just say; I guess about 300 or 400 feet.

Q. How much further out were their set nets beyond this?

A. He was above the cannery; I was quite a ways below the cannery.

Q. What kind of a net did you use?

A. Linen twine; six and one-half or seven inch mesh.

Q. The same as gill net?

A. The same as gill net; with small mesh; I got silversides.

Q. That is silverside salmon? A. Yes, sir.

Q. These fish caught in the Columbia River and the North River and others all run upstream?

A. They are all supposed to be going up. [365]

Q. When you were drifting in the Columbia River, why didn't you drift over these buoys?

A. I did not want to get my net torn.

Q. You were satisfied to keep outside?

A. Yes, as far as I could.

Q. You have three or four miles of open water?

A. Yes, lots of open water there, and a good many others there.

Q. The trouble is that there are so many gill net fishermen they crowd?

A. Yes, sir, and sometimes they have four or five nets together. I have started to lay my net out at Fort Columbia and got a mile and a half or two miles below Sand Island and couldn't get my net out, be-

(Testimony of M. Lugnet.)

cause there was always some other nets out there. It was no use to try to lay on top of another.

Q. Do those gill nets frequently get tangled?

A. Yes, sometimes they get all mixed together and go to the bottom and you cannot see any of them.

Q. They have troubles of their own as well as with buoys?

A. Yes, they have enough trouble all right; I had it any way.

Q. How did you catch fish on the river; were you high man or low man?

A. Well, I was pretty good in my young days, but now I guess I am getting too old.

Q. How many tons did you average per season?

A. When I first was fishing I did not weigh the fish; we counted them.

Q. Did you ever fish by weight?

A. Yes, the last four years.

Q. What is your average?

A. About 5 or 6 tons or 7, or sometimes a little over.

Q. Are you fishing still in the season?

A. I have my gear but I was not fishing this last summer. [366]

Q. Did you fish the year before? A. Yes.

Q. Who did you fish for?

A. For the combine—the Columbia River Packers' Association.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The kind of fish I caught on North River was sil-

(Testimony of M. Lugnet.)

ver salmon and dog salmon. We caught no Chinook salmon, not in a set net. These dog salmon run up the river in great quantities, sometimes even on the high ground. They are entirely different from the Chinook salmon.

Q. You could not catch salmon in a set net on the Columbia River?

A. I don't think so; I have not seen it. They might, but I never saw it.

Q. And these dog salmon and salmon fish you got up there are not worth anything compared with the Chinook?

A. They paid pretty good for the silversides, but the dog salmon we had to throw overboard; they are not worth anything at those times.

Q. Speaking of these buoys, state whether or not in your judgment any fish could have been caught in a set net in front of Sand Island where these buoys were.

A. That is more than I could tell; I could not make any judgment at all, whether they would work or not.

Q. Do you think that is worth anything for a set net location?

A. It would not be worth anything to me; I know that.

Q. Why wouldn't it? A. I would not have it.

Q. Why?

A. Because I could not make anything on it, and I would not try it.

(Witness excused.) [367]

[Testimony of Ole J. Settem, for Plaintiff (in Rebuttal).]

OLE J. SETTEM, a witness called on behalf of the plaintiff, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. FULTON.)

I reside at Astoria; I have lived there since 1884. I have followed fishing in the summer-time and working in the sawmills in the winter-time. My principal occupation was fishing, and I continued that until 1905, when I went to work for the Department of Fisheries for the State of Oregon, as water bailiff. That is the name the legislature gave it, what it means I don't know. My business was to enforce the law of fishing on the Columbia River and other places, and to look after the fishermen to see that they had their licenses and so forth. I was an officer of the State of Oregon, appointed to see that the fishing laws were enforced, and it was my duty to inspect all fishing gear and appliances and see that they were as required by law, and that parties had licenses—about the same as the Fish Commissioner himself. My territory was on the Columbia River up so far as Celilo Falls. I held that office up to the fall of 1908, and in performing my duty I had occasion to and did observe the manner in which fish were caught in the river outside of my own general knowledge, and I had occasion to, and did, examine into the manner in which set nets were operated. I have examined a great number of set nets on the lower Colum-

(Testimony of Ole J. Settem.)

bia River. Set nets are operated all along the Oregon side from Youngs River beach, near Astoria, to the eddies near the mouth of the Cascade Locks. There were some nets operated in the Columbia River below Astoria. One was hung on the piling on the Union Fishermen's cannery, and one on the old traps standing below the cannery, which is pulled out now. They were not there in [368] the summer season, because the fish don't go in there in the summer. It is in the winter from the first of January to the first of March when the season is closed. When the season opens in the spring they don't use set nets because the fish don't go in. These set nets might get a salmon, but if they get a fish, it is generally a steelhead, because the steelhead will get the web twisted around his teeth; otherwise, he would be pulled out by the tide. The tide is pretty strong down by the traps, but not by the cannery. I have had experience in operating set nets, and from my experience it does not pay for anyone to operate a set net except you have an eddy to put it in and the net fixed just to fit the eddy. I have had two years' experience operating set nets for six or seven weeks, and some years ago, I was operating set nets in the winter-time. I understand how they are operated, and I have also examined all the location between Astoria and the Cascade Locks, and I informed myself as to which set nets caught fish and which did not. These set nets on the Columbia River are always placed in eddies. I have not found set nets in the river excepting in the eddies. There are a number of them be-

(Testimony of Ole J. Settem.)

tween Stella and Hog's Island. There is a straight beach there and they have a pile-driver and drove piles out from the shore and used brush and rocks at the bottom and filled it up to the low-water mark, and then planked it up to the high-water mark, and thus they made an eddy to catch the fish; otherwise they could not catch fish. They made these eddies themselves, and it is only in eddies that set nets are operated. That is for two reasons: the current comes down fast and the nets will stand up and down. If the net is not set out from the shore, *it if* is tied to the piling and made fast to the beach so that the cork line cannot go down, then they will take the lead line up from the bottom, if there is no piling there but only buoys and anchored solid, it will take the cork line down, and if there [369] is only one end fast, then the meshes will stand that way in the current, lengthwise, and no fish can be caught. In order to gill, the mesh must be square, and it will not do that, except in an eddy.

I have gill netted a good many years, mostly in the lower river from Scarboro down along Sand Island and right out to the bar.

I am familiar with Sand Island and have been for many years. I saw these buoys that were placed in front of the Columbia River Packers' Association's fishing grounds, which it leased from the Government on Sand Island. I don't know the lines exactly, but I know it was in front of that place. I examined them and I found the license numbers O. K. When I was there there were two men laying in a skiff;

(Testimony of Ole J. Settem.)

one man sitting in the bow and one in the stern. They had five or six fathoms of net, and two guns in the boat, and one big revolver on each side, and a belt around their body chuck full of cartridges, and the gun getting ready to shoot; what they intended to do I don't know. They asked me what I wanted and I told them I was going to see if they had licenses as required by law, and when I saw that I said that is all. One of the nets was close, and I saw the character of web it contained. It was a cotton seining web, with heavy lead and cork lines, seine cork and some big gill net corks.

Q. Was it possible to catch fish with that?

A. You could not catch fish with a gear like that, by set net. It might have been used for seining but not in that position. No fish could be gilled with that net.

(Witness continuing:)

These buoys were right in the drift of the gill netters on the running tide, on slack tide, the gill netters don't go in there because there is no fish to be had. The reason of that is, **[370]** some say that the fish go right out in the deep water to catch the current; others think the fish are there, but stay right down on the bottom and do not move; and I know men who have tied long line, fast up on the beach and with 20 or 30 fathoms of net, and then drifted at anchor with the boat and held the net until the tide starts, but I have never heard of men getting fish that way. My experience and that of others with whom I have

(Testimony of Ole J. Settem.)

talked, is that at slack water fish do not run near the shore.

Q. What in your judgment would be the rental value, or otherwise, of this ground you speak of where these buoys were located for set net purposes?

Mr. DORR.—That is objected to as incompetent and no sufficient foundation laid, and immaterial.

A. My opinion is that a thing you cannot be benefited with is worth nothing.

Q. What would be the fair rental value of that ground for set net purposes?

A. No value at all; nothing at all.

Q. Why?

A. Because it would not pay anyone to operate the set net.

Q. Is there any way one could operate set nets there successfully?

A. My judgment is that there is not.

Q. Explain your reasons why.

A. Because you cannot keep a set net there in the running tide; the gill nets drifting down on the strong current and back on the flood, they will hook that and drag them away, and if they are anchored too solid to drag them, they will cut them away; they will not stand for them down there.

Q. Any other reason?

A. The experience is that there is no fish to be caught near the beach on a slack tide.

Q. Your judgment is that no matter how skillfully a set net would [371] be placed or operated, it would catch no fish?

estimony of Ole J. Settem.)

A. It would not catch fish that would pay anything operate.

Q. Something has been said about fish gilling in ar water; I wish you would explain that a little re fully.

A. The experience of all those who have operated l nets is that when there is clear water and fish ne up to the net, they see the net and stop and they n along the net. I have seen that myself time and ne again, and have heard others say the same.

Q. When the water is clear, when do gill netters l fish in their nets? A. At night.

Q. What proportion of the time is the water clear linarily around Sand Island?

A. It is most always clear on the flood, the whole ason through. Of course, as soon as the flood stops, e muddy water comes down, but it settles.

Q. What proportion of the season is the water of e Columbia River muddy?

A. In June is generally the freshet time, and then is muddy, until it is clear.

Q. The Columbia River is ordinarily a clear eam? A. Yes, sir, it is.

Q. How does the tide come down there in the vicin- of Sand Island; how long a space is there between e turn of the tide at high water?

A. It is a very short time that there is slack water.

Q. Explain the action of the tide in that respect.

A. If you are close to shore it will stay on longer, t if you are thirty or forty fathoms out it will stay ry little. It depends on the weather; if it is spring

(Testimony of Ole J. Settem.)

tide there is no appreciable slack.

Q. And in the small tides, how long is the space between the [372] current?

A. That depends on the weather.

Q. Well ordinarily?

A. On the small tide there is hardly slack water at all. It begins coming ebb up along the shore again. In real fine weather, no wind, there might be slack along the beach for half an hour or an hour and a half. There is hardly two days that is the same; you cannot say exactly.

Q. Now, what has been your experience with fish that have been gilled, where your net has been caught in anything so that the current runs through your net?

A. The fish is torn out; sometimes I have been snagged. You can get fish by the head in the net and the fish is gone if there is running tide.

Q. So that if you are able to lay a set net in front of Sand Island at the point where these buoys were and should be fortunate to catch salmon at slack tide, what would become of it if you did not take it right out? A. It would be thrown away.

Q. And you think it could only be fished at all not to exceed an hour or an hour and a half on high tide?

A. Not so long as that on high tide; on low tide it might.

Q. A man would have to be awfully busy to take a salmon?

A. Yes, if there was any in. If it is a set net, you

(Testimony of Ole J. Settem.)

have to be there to go over it or you cannot raise it.

Q. Why?

A. Because the current is so strong it will hold it down.

Q. It would hold the buoys right under water?

A. Yes, sir.

Q. And then if there were fish in it at low slack they would get away?

A. Yes, at low slack. **[373]**

Q. One or two witnesses have testified that in their judgment if we had allowed eight set nets to have been fished there, they would have caught in the neighborhood of 100 or 150 tons of fish; what is your judgment about that?

A. That is the same as when the grandmother tells the children some stories, they may believe it, but people of common sense would never believe it.

Q. It is a fairy tale? A. Yes, that is all.

Cross-examination.

(Interrogated by Mr. DORR.)

Q. You were water bailiff for four years?

A. Yes, from the spring of 1905 and resigned in the fall of 1908.

Q. What have you been doing since that?

A. I have been fishing.

Q. Gill netting?

A. Set netting and gill netting.

Q. Where?

A. I have been operating set nets these two years in Young's River on the south side of Astoria—the southwest.

(Testimony of Ole J. Settem.)

Q. Below Astoria?

A. Yes, sir, you have to go below Astoria to go there.

Q. Did you catch fish there? A. Yes.

Q. What kind? A. Shad.

Q. Then there are shad in the river also?

A. Yes.

Q. Are there many of them?

A. Well I catch enough to make wages.

Q. How is your set net constructed over there?

A. It is a special gear for shad. [374]

Q. It is the same general construction?

A. Yes.

Q. How is it built?

A. I tie them fast in shore and anchor buoy in the stream.

Q. How long is the net?

A. It depends on the size of the river. The longest net is 45 fathoms, down to 14 fathoms.

Q. That is, depending on the width of the river?

A. Yes.

Q. You are not allowed to stretch the net across the whole river?

A. There is no limit in District Number One, but in the Coast streams it cannot be done.

Q. State what the limit is there.

A. One-third of the stream.

Q. How many set nets are there ordinarily each season on the Columbia River that have been under your jurisdiction as an officer?

A. The highest number I had, if I remember right,

(Testimony of Ole J. Settem.)

was 194; that included right up to The Dalles.

Q. That is on the Oregon side?

A. The Oregon side; that included the Willamette River, Young's River, and all the tributaries.

Q. One hundred ninety-four?

A. I think that was it.

Q. Where is Stella?

A. Stella is in Washington opposite Mayger and half way between Portland and Astoria.

Q. Where was this long beach?

A. That was on the Washington side.

Q. Between Hog Island and Stella?

A. Yes, sir.

Q. What were you doing over there? [375]

A. I am all over; I took in both sides.

Q. Were you under the jurisdiction of Washington too?

A. No, I was to report to Burton if there was any violation there, and he would report to me if there was any violation on the Oregon side. He was the deputy fish commissioner of Washington.

Q. You just had an understanding you would look out for each other?

A. Yes, sir; we worked together in that way.

Q. How long is this beach, between Stella and Hog Island? A. I think about three miles.

Q. A straight beach? A. Yes, no points.

Q. And no eddy?

A. No, except what they made.

Q. They made an artificial eddy by putting in rock and brush? A. Yes, sir.

(Testimony of Ole J. Settem.)

Q. As you explained? A. Yes, sir.

Q. How many set nets in that section?

A. One set net in each of those eddies.

Q. Between Stella and Hog Island?

A. Three; one to each eddy.

Q. That is these artificial eddies? A. Yes.

Q. What kind of a current do they have over there commonly?

A. The current comes straight down along the beach; a swift current, except in the summer when the river is low, but they could not put in set nets just for the slack water.

Q. Does the tide flood up that far?

A. In the summer-time it comes up as far as Willamette River.

Q. What is the ordinary rise and fall of tide at Sand Island? [376]

A. From five feet six inches up to pretty near ten feet.

Q. What is the average?

A. About seven and one-half or eight feet.

Q. For the same reason you were looking after the interests of the Washington Commissioner, you examined these buoys in front of Sand Island?

A. Yes, sir.

Q. Did you find them properly licensed?

A. Yes, they were O. K.

Q. And you told the men they were all right?

A. I told the men I had nothing to do with them.

Q. And you did not attempt to bother?

(Testimony of Ole J. Settem.)

A. I had no right to bother them.

Q. They were legally there as you understood?

A. According to the law, yes.

Q. You made no report of it to the Commissioner?

A. No, I had nothing to report; nothing wrong.

Q. You did not make reports unless you found something wrong? A. No.

Q. The gill netters you say fished in the night?

A. Yes, and in the daytime too, in the spring-time.

Q. Generally in the night after July 1st?

A. At all seasons at night.

Q. But not in the daytime?

A. On the flood; if there is a wind that stirs up the sand and a strong current takes the sand along and makes the water muddy.

Q. Now, isn't that the case most of the time?

A. No.

Q. On the flood tide the sand is stirred up and the water is discolored with the silt and sand in suspension in the water? A. Yes. **[377]**

Q. That is the universal condition down there in the flood tide?

A. No; there may be two or three days of that.

Q. I understood there was a law passed in Oregon in 1908 prohibiting fishing down there in the night?

A. No, sir; no such law been passed.

Q. I am mistaken about that?

A. You can fish at night during any time you can fish in the day.

Q. Maybe I am mistaken in assuming there was a referendum act passed.

(Testimony of Ole J. Settem.)

A. There was an act but not prohibiting night fishing. There was a prohibition against fishing below a point between Smith Island and Pentalus. It did not take effect until the fall of 1908, the 10th of September.

Q. Are you in any way connected with the Columbia River Packers' Association? A. Not at all.

Q. Entirely independent?

A. Independent; I don't owe them a cent and they don't owe me.

Q. You are not working for them?

A. No, sir.

(Witness continuing:)

(Interrogated by Mr. FULTON.)

Q. You have no interest in the corporation one way or the other?

A. Not so far as I know, unless they would give me a few hundred shares of stock.

Q. But they have not? A. No.

(Witness excused.)

Plaintiff rested. [378]

Sur-rebuttal.

November 11, 1910.

[Testimony of Jens Nielson, for Defendants (Recalled in Sur-rebuttal).]

JENS NIELSON, a witness heretofore called and sworn on behalf of plaintiff, was recalled by the defendants as a witness on their behalf, and in response to interrogatories propounded to him testified as follows:

(Testimony of Jens Nielson.)

(Interrogated by Mr. DORR.)

Q. I want to ask you Mr. Nielson whether there is not a great deal of jealousy down on the river amongst the gill net men against the other kinds of gear that are used there for fishing.

A. Not if they don't come out in our route where we are drifting. The seines, of course they don't bother us. If they lay out ahead of us, they generally wait until we are past, because we drift them. There is only one kind of seine bothers us.

Q. And there has been a great deal of opposition to fish traps and other kinds of gear by the gill net men?

A. That is not for the fishing, but that is because we claim they kill off the young salmon for the hatcheries. The traps are in Bakers Bay and not out where we are drifting; that has been closed a long time. We had no objection at the time they started in with traps.

Q. You claim that set nets will kill off young fish?

A. Oh, no; I don't say that.

Cross-examination.

(Interrogated by Mr. FULTON.)

The only objection that the gill netters have to traps applies only to such traps as are in the navigable portion of the river and obstruct the floating of the gill nets. There is no fight against traps because they are traps, but when they obstruct [379] navigation, then there is an objection, but if they are not, we do not object, if they don't get in our way. Our way is in the navigable stream, and the

(Testimony of Jens Nielson.)

objection to fish wheels is that they indiscriminately catch everything that comes in their way and destroy the young salmon, and does not permit the salmon to reach the spawning grounds, and that would ultimately destroy the salmon that is in the Columbia River.

The class of people comprising gill netters are all kinds; in the summer they fish—men of all trades, and a great many well-to-do people right in town go out fishing. A majority of them have families of their own and live in Astoria, and men who stand high in the community, both church people and educated people; all kinds of trades people, carpenters, blacksmiths and so forth—about every trade is represented on the Columbia River. At the time of spring fishing, *there* are not a band of outlaws by any means; if *there* are, I must be one.

Redirect Examination.

(Interrogated by Mr. DORR.)

Fishing season begins the first of May and lasts until the 25th of August. That is what we call the spring fishing season. Of course, a good many don't start until in July.

I have seen young salmon at the hatcheries, but I have never seen any going up the Cascades. I have never heard of young salmon going up the river to spawn; they generally go down. Of course, small salmon about two pounds or two and one-half pounds go up. I cannot say whether they would be simply small but not young. There are lots of young salmon that go up the river, two or three pounds.

(Testimony of Jens Nielson.)

Q. What I want to know especially is when you allude to catching twelve tons of salmon, in your testimony yesterday, during the season, what season did that mean?

A. We count from the spring opening to the spring closing. **[380]**

Q. And where you said the average was three or four tons you meant the same season?

A. Yes, sir.

Q. You did not refer to the fall or winter fishing?

A. No, sir.

Q. Just what you call the spring season?

A. Yes, sir.

Q. And that is what is commonly meant by the fishing season?

A. Yes, sir, on the Columbia River; that is the spring season. Of course in the fall only a few men go out. The majority do something else.

(Witness excused.)

[Testimony of J. F. Ford, for Defendants (Recalled in Sur-rebuttal).]

J. F. FORD, a witness on behalf of the defendants, was recalled, and in response to interrogatories propounded to him testified as follows:

(Interrogated by Mr. DORR.)

I have already testified in this case at the former session, and at that time, I produced some photographs. I am personally acquainted with the waters and the contour of the shore on the south side of Sand Island. I have some photographs of the locality showing the general course of the shore at these fish-

ing grounds in controversy in this suit, other than those I have heretofore produced.

I am acquainted with the shore along that part of Sand Island, and there are three circles on the south shore of the island, making two small bays and one large one, and there are eddies in each of the small bays. The first little bay is at the east end of the island; one is near the center, and the other is a little west of the center of the island. I have a photograph covering particularly that part of the shore. (Here witness produced a photograph.) This is a photograph taken by **[381]** myself. It was taken in the year 1907, in the month of August. It was taken from the center of the island, looking west or southwest, on the beach, on the sand on the south shore of the island.

Whereupon, said photograph was marked Defendants' Identification Number 21.

This is a true picture. The ground shown in this photograph that the seine is being drawn on, to the best of my knowledge, is the middle ground shown at a low tide.

Q. At what stage of the water, if you know, have you seen the principal seining there?

Mr. FULTON.—That is objected to as incompetent, irrelevant and immaterial and not rebuttal testimony, but a part of the defendants' main case.

A. The best catches I have seen are at low tide. I have seen them fish at all stages on the different grounds but not on this lower ground, but the chief fishing is at low tide. The bend in the shore is the

(Testimony of J. F. Ford.)

lower bay. I do not know who these people are in the photograph; they are fishemen; I don't know any of them by name. My object in taking this picture was for the commercial value to me as a photograph; it had nothing to do with this case.

Thereupon, counsel for defendants offered said photograph in evidence.

Mr. FULTON.—Q. I would like to ask, do you know where the Columbia River Packers' Association were fishing on sites two and three during the years 1908, 1909 and 1910? A. Yes, sir.

Q. This (referring to the photograph) is in front of their premises?

A. If I am right, it is the middle ground called number two.

Q. In front of Site Number Two where the Columbia River Packers' Association were fishing?

A. Well, I would not know as to the exact survey. [382] It is the shore of the land where the Columbia River Packers' Association were fishing in 1908, 1909 and 1910, but I don't know who was operating the seine there, unless it would be Jack Service. I think that is him (witness referring to one of the men in the picture), but I could not say for sure. I think that this picture was taken on the ground that Jack Service was seining during the year 1907. The distance from the man shown in this photograph to the point down at the further left side of the picture, I should judge it to be a mile.

Thereupon, counsel for plaintiff objected to the introduction of said photograph for the reason that

it is incompetent, irrelevant and immaterial, and being part of the defendants' main case.

Mr. DORR.—Q. Does the picture show the extreme southern part of that island?

A. Yes, sir.

Q. Whereabouts in the picture is that shown?

A. It is at the west extremity of the south shore and fishing ground.

It shows at the old steamer "Republic." That would be just off the picture, at the point of those seines on the left side. The bow of the boat you see there is a sailing skiff. That boat belongs to the crew. The point of land just over the boat is the outer point of the lower sands. The boat is, of course, much nearer, but you can see the land in the perspective.

Whereupon, counsel for defendants offered said photograph in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 21," and is hereunto attached so marked.

Thereupon, counsel for defendants handed witness another photograph and asked the witness if he could identify the same.

A. That is a photograph of the middle grounds on Sand Island. I [383] made this picture in the year 1905 for commercial purposes. The grounds included in this photograph are a little east of the other picture (Exhibit No. 21), looking down across the same shore and beach, and it shows the shore line and the point of sands where they are seining below. When I took this photograph, I was standing near

(Testimony of J. F. Ford.)

the middle of the island, on the south shore, looking west, and this picture shows the outline of the south shore of Sand Island correctly at that locality. I should say that the indentation of the bay into the land, in the arc of the circle that it makes, is 500 feet. I do not know the people shown in the picture. They were just hired fishermen. The picture was taken in the month of August at low tide.

Whereupon, said photograph was offered in evidence by counsel for defendants, and the same was received in evidence, marked "Defendants' Exhibit No. 22," and is hereunto attached so marked.

(Witness continuing:)

I have another photograph here taken by me in August, 1907, at the same time I took Exhibit No. 21, or within a few days of that time. It was taken for the same purpose. The territory covered by this photograph is simply on the lower point, outer point of the sands on the southwest point of Sand Island. It is the main point that is shown in Exhibit 21, at the left margin of that picture. I was standing at the waters' edge of the sands, on the shore to the eastward of that point, and looking westward. The picture was taken at low tide. I know part of the people that are in this photograph. Willie Brumbach is standing in the boat, with some visitors. I can't name the crew, but it was Steve Butt's crew. I know this ground as the lower fishing ground—I think it is what is known as the Brumbach ground. I understood that McGowan and Company were operating the ground that year. The only object I had in mak-

(Testimony of J. F. Ford.)

ing this picture was its [384] commercial value and its beauty. The fish shown in the net in this picture are principally salmon, steelhead and salmon and blueback—Chinook salmon.

Whereupon, said photograph was offered in evidence by counsel for defendants, and the same was received in evidence, marked "Defendants' Exhibit 23," and is hereunto attached so marked.

(Witness continuing:)

I have another picture, marked "Copyright 1905 by J. F. Ford." I made this picture in August, 1905. It covers what is known as the Brumbach ground, that is, the lower end. I made this picture for commercial purposes the same as the others. When I took this picture I was standing on the beach just above the fish, looking to the southwest. This Brumbach ground partly lays in the bay I speak of and covers this point. I know many of the people included in this photograph—James McGowan, Rube Rodgers, and William Vaughn. They were working for McGowan, catching Chinook salmon, mixed with steelhead and blueback. This picture was taken at low tide.

Whereupon, counsel for defendants offered said photograph in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 24," and is hereunto attached so marked.

Q. Can you show the Court these bays which you have now specifically testified to as existing on the south side of Sand Island in any other photograph that you have heretofore produced?

(Testimony of J. F. Ford.)

A. Yes, sir. In this photograph of Sand Island marked Defendants' Exhibit Number 2, showing the three little bays, one at the east end, the middle and the west of the center of the island, showing the eastern point of the island, the two middle points and the spit Republic. The red cross in this picture seems to be at the east end of the island opposite the first little bay; then we have the little bay in the center of the [385] island, and the bay in the west end, which is immediately to the left on the picture with the red cross, and the dots out in the water are gill net sail-boats, and the rows of piling shown on this picture are fish traps.

Cross-examination.

(Interrogated by Mr. FULTON.)

We usually call the little circles that are partially protected from three sides bays; the water in the middle circle we call a bay. I do not know where I got that definition. I do not recall the definition that the geographies gave of a bay. I know that all shores and streams have slight indentures, more or less. This indenture is in the same shape as Baker's Bay, only on a miniature scale. The shore is about a mile long and indented 500 feet.

Q. And as a matter of fact this is a long shore and it just indents in very slightly and the current runs right along just the same?

A. No, the current slacks there.

Q. How do you know?

A. I have been there in a boat many times.

(Testimony of J. F. Ford.)

Q. The current slacks anywhere at certain stages of the tide?

A. No, sir; not out 500 feet; it is a fierce running tide.

Q. Then 400 feet out; how deep is the water?

A. I don't know.

Q. You mean 500 feet out at low tide or high tide?

A. There would be possibly 100 feet difference between the tides.

Q. Then which do you refer to? A. Low tide.

Q. Then that would be about 600 feet out at high tide? A. Yes, sir.

Q. And the current is running fiercely?

A. Yes, sir. [386]

Q. Let us understand that; the current is running fiercely? A. Yes, sir.

Q. As fast as it does anywhere? A. Yes, sir.

Q. Now, just how close to the shore does this fierce current stop; there must be some space between the 500 feet and the shore where it slacks?

A. Yes, sir; 100 or more feet where it gradually slacks.

Q. About 100 feet from the shore?

A. No, from the swift water.

Q. That would reduce it to 400 feet from the shore?

A. Yes, possibly; but let me say that at different stages of the tide it is different.

Q. Now, you stated that 500 feet from the shore the current runs swift, fiercely?

A. Yes, sir, it does.

Q. And 100 feet back from the 500 feet you would

(Testimony of J. F. Ford.)

begin to get slack? A. Yes, sir.

Q. And where is it slack; how close to the shore does it slack? A. Well, I couldn't tell.

Q. You know well that with the large body that is there, with a fierce current 500 feet from the short, you have a current almost right up against the shore?

A. No, sir. I know that while one boat will be going swiftly downstream, 300 feet from that a boat would go the other way.

Q. Three hundred feet below or above?

A. North of it, in shore.

Q. That is what you call the eddy? A. Yes, sir.

Q. Where one current is going upstream and the other is coming down? [387] A. Yes, sir.

Q. That is the whole length of this indenture?

A. Yes, sir.

Q. And out 500 feet from the shore you have a fierce current going one way and another current going the other?

A. Yes, sir, a mild current going the other way.

Q. What do you mean by the eddies?

A. Those little bays.

Q. Where the water swirls around at times?

A. Yes.

Q. Those swirls do not stay in any particular place, do they? A. No, sir.

Q. They run up and down and around like a maelstrom?

A. Those little slacks run easily; they can handle a seine in them.

Q. But there is no permanent place for the eddy;

(Testimony of J. F. Ford.)

they run up and down wherever there are currents meeting at any particular time; and that forms sort of a swirl? A. Yes, sir.

Q. That is what you call an eddy?

A. That is one. This eddy is made by the current striking the lower part of the sands and letting the water be slack between that and the swift current.

[Testimony of Nels Sankala, for Defendants (Recalled in Sur-rebuttal).]

NELS SANKALA, a witness called on behalf of the defendants, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. DORR.)

I live at Ilwaco; I have lived there since 1884, and I am by occupation a fisherman. I fished with gill nets in 1883, and then worked in the cannery for the Aberdeen Packing Company; [388] after 1899, I worked in the seine; for the last three years I have not worked. I worked with seines in 1899, on Sand Island.

Q. Who did you acquire the right from at that place in 1899?

To this question counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

A. The Aberdeen Packing Company owned that and turned it over to the Columbia River Packers' Association, and I got it from them.

I bought it from the Columbia River Packers' Association in 1899.

(Testimony of Nels Sankala.)

Mr. FULTON.—I further object on the ground that a transfer of real estate cannot be established by parol testimony, nor can a transfer of an hereditament nor an appurtenance be proven by parol, and plaintiff moves to strike the testimony of this witness as to the purchase from the Aberdeen Packing Company and from the Columbia River Packers' Association.

Mr. DORR.—We do not claim he purchased any real estate or hereditament, but that he purchased a fishery right.

Mr. FULTON.—We insist on the motion, and on the further reason that the fishery right is an appurtenance if it exists at all, and consequently can only be proven by a writing.

Mr. DORR.—Our contention is that the witness purchased a possessory right of fishery.

Mr. FULTON.—I further object that no fishery right can be acquired in the State of Washington or in the State of Oregon by possession.

After I purchased this property, I started fishing there, and I fished there for about eight years altogether, beginning I think with the year 1899. The last year I fished there was 1907. During the last three years I had a partner fishing there with me. I know the defendant, Henry S. McGowan; I have known him for about twenty-five years. I know the set net [389] locations placed by him on my fishery in 1908, in the month of June. I was working there on a set net for McGowan.

Q. State whether McGowan or anyone else asked

(Testimony of Nels Sankala.)

you for permission to locate the set nets on that ground in 1908.

To this question counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

A. Yes, sir, he put out the buoys and I put in the net.

I know where Sites 2 and 3 are on Sand Island. I was at No. 3; McGowan was next to me. I was in front of No. 3 and McGowan in front of No. 2. There were four set nets there in front of No. 3. Those were put there with my permission.

Q. I want to ask you whether there is any eddy along there in that water?

A. That is pretty hard to tell. Sometimes hardly any at all; sometimes about 150 fathoms, there is an eddy.

Q. How far does the eddy go out if there is one?

A. Sometimes pretty far out and sometimes not much at all; sometimes at half tide it is pretty far out, and sometimes not far out.

Sometimes the water runs so that they put the seine in the shape of a jack-knife, half closed, and then run it back and forth. When I was fishing on my own account, I operated three seines; I used two all the time.

Q. How much money did you make a year during the fishing season?

To this question, counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

(Testimony of Nels Sankala.)

A. Some years more and some less; about five, six to eight thousand dollars, I think is the highest.

In seining there I found that you did not get any salmon until the seine comes up to the shore. The seine that I used was about 250 fathoms in length. At low tide all of the fish [390] are close to the shore. I caught most of my fish at low-water slack, or the first of the flood.

Cross-examination.

(Interrogated by Mr. FULTON.)

My seine was 200 fathoms in length. I put it out full length from the shore. It went out into the channel about 200 fathoms. I put it out there to fish.

Q. Couldn't you fish just as well close inshore?

A. Yes, what I could put my seine.

Q. Couldn't you catch just as much fish close inshore in the place where the water is all slack as you can way out in the channel?

A. Sometimes lots of fish close to the beach, and lots outside; I don't go very far out.

Q. What do you call close; how many fathoms?

A. With the seine.

Q. You say sometimes you catch them close; how many fathoms do you call close?

A. About 100 fathoms or something like that.

Q. Don't you know that salmon don't run close to the shore at low slack water?

A. I have seen them swimming close to the shore.

Q. That is in your seine; but when they are not driven in by the seine, at low slack water?

A. Pretty close.

(Testimony of Nels Sankala.)

Q. How close at low slack water?

A. They come close in July or August.

Q. I am talking about low slack water. A. Yes.

Q. Do salmon come close in shore—not steelheads?

A. Yes, sir.

Q. How close? [391] A. That is hard to tell.

Q. One hundred fathoms?

A. One hundred, or seventy-five, or even fifty.

Q. At low slack water?

A. Yes, sir; yes, I catch fish all right there.

Q. You put your seine out in low slack water when there is no current? A. Oh, yes.

Q. About 100 fathoms? A. Yes.

Q. Seventy-five or a hundred?

A. I put it all the way.

Q. You only put it out about 75 fathoms?

A. I haul it out and bring it around.

Q. How far out did it go from the shore?

A. I got the tail line clear out.

Q. That would be 200 fathoms?

A. Yes—150 or 175.

Q. You say that you bought this fishing right from the Columbia River Packers' Association?

A. Yes, sir.

Q. Who did you make the deal with?

A. Mr. R. A. Hawkins. I asked him if the Aberdeen Packing Company had turned that over to the combine, and he said yes, that he put it in at three hundred dollars. I said that I would see the Aberdeen Packing Company's books and find out how much fish they caught before.

(Testimony of Nels Sankala.)

Q. Then what did you do?

A. Mr. Hawkins said he would give me the first chance to buy the business.

Q. And he wanted how much for it?

A. Three hundred dollars, and I gave him a mortgage and paid him [392] the same year.

Q. Did you get a writing showing what you bought?

A. No. I do not know that he gave me any writing; I don't know.

Q. In whose name was the license issued for fishing the ground?

A. He did not give me the license.

Q. Whose name was the license in?

A. I don't know.

Q. You swear you don't know in whose name the license for those seines fishing that ground was in during the time you fished after you claim you bought out from the Columbia River Packers' Association?

A. Yes, I said I want a license, and he said he would keep the license, and got it so that nobody else would come over there, but that it was my place he said; he said he would hold the license.

Q. In his name? A. I don't know what name.

Q. You never paid for the license?

A. Yes, I paid it every year.

Q. Then the license was always in your name?

A. No.

Q. In whose name?

A. I don't know what name; he put in the license. I gave him the money and he gave me the number.

(Testimony of Nels Sankala.)

Q. Don't you know that the Columbia River Packers' Association always held the license?

A. I don't know; I had the number. He gave me the number. I paid him the license.

Q. And don't you know that you bought for this three hundred dollars some seines and other property from the Columbia River Packers' Association and did not buy fishing sites?

A. I bought the whole outfit to fish. [393]

Q. Now what made you give it up, why did you quit?

A. He put it in at too high a price and I had no money to raise that price.

Q. The fishing right did not belong to you then?

A. No, the Government owned the land.

Q. Then you never owned it at all?

A. I did not own the land.

Q. I thought you said you did?

A. I paid the license.

Q. You say that the Government owned the land?

A. The Government rented it out.

Q. Who owned it in the first place?

A. The States, I think.

Q. You thought the States owned it?

A. I paid the license in the States.

Q. You know how to get a license for seining?

A. Yes; I saw a license application in the window and I told Mr. Hawkins to get the license.

Q. Did you sign your name to any license, to any paper? A. No, sir.

Q. Don't you know you cannot get a license unless

(Testimony of Nels Sankala.)

you sign the application?

A. I don't remember that; I got some license all right anyhow.

Q. Where is it? A. I haven't any now.

Q. Did you ever have one?

A. I don't get nothing but the number.

Q. You never had the license?

A. No; I got none of the licenses at all, but I paid it.

Q. So when the Government concluded to survey this Sand Island off into sites, they put it up for bid?

A. Yes. [394]

Q. Did you bid on it?

A. Yes, I got it the first time.

Q. What did you bid on it for?

A. I wanted to fish it.

Q. But it already belonged to you I thought.

A. But the Government took it after that.

Q. I thought you owned it.

A. I owned it so far but not then; I lost it.

Q. So that the Government took it away from you?

A. Yes, sir.

Q. The Government took the sites away from all of them along there?

A. Yes; the first time they came out and rented them.

Q. To whom did the Government rent this place where you were fishing?

A. To Winter the first time; I don't know the man.

Q. What year did Winter lease it? A. 1905.

Q. Who fished in 1906? A. I did.

(Testimony of Nels Sankala.)

Q. How did you happen to get it?

A. I got it from Tallant.

Q. The truth is that W. C. Tallant rented it from the Government for the years 1905, and 1906 and also 1907? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. So that you did not fish it in 1905?

A. Yes, sir, I did; I got it from Tallant and Grant.

Q. How much did you pay him for it?

A. We were partners together. [395]

Q. And paid the rent together?

A. Yes, sir—fifteen hundred dollars a year.

Q. So you and Tallant fished it in 1905?

A. Yes, sir, and 1906.

Q. Who fished it in 1907?

A. Tallant fished it alone. I rented my seine in 1907.

Q. So that you quit fishing in 1906?

A. Yes, sir.

Q. And Tallant fished for himself in 1907?

A. Yes, sir; I worked over there in 1907.

Q. Why didn't you put set nets in front of it when Tallant took it away from you?

A. We was working together; I worked for wages after that, the last time in 1907; I rented my horse and seine.

Q. Now, these eddies you speak of are formed by one current coming upstream and the other coming down, and they form kind of back swirls or whirlpools which run up and down the beach?

A. Yes, sir.

(Testimony of Nels Sankala.)

Q. They don't stay in any particular place?

A. No.

Q. It is pretty hard to keep up with them, with a horse? A. Oh, yes.

Q. You say you put a set net in front of these sites in 1908? A. Yes, sir.

Q. Why did you do that?

A. I was working for Mr. McGowan and he wanted me to.

Q. That is H. S. McGowan?

A. Yes, he asked me to put in a set net and he would put in the buoy, and I said I would do that.

I put the set nets in. The nets were made, one out of a piece of 6-inch mesh, and two pieces of seven and one-half inch mesh, ten ply twine, one was cotton and two of gill nets. I put [396] in three set nets, and I kept them with four buoys, and I had the set net fastened at one end to the buoy. I never gill netted in my life. I put on the cotton twine net, because it was of smaller mesh; I did not have a gill net in small mesh. I know that net made from cotton twine will gill fish; I have seen them gilled in seines. In my judgment, fish will gill in nets made from cotton twine. I kept these nets there one week. I did not catch any fish there. There was lots of fish in the set nets, but I saw the buoys come up.

Q. Name one man on the Columbia River who ever employed cotton twine in making a gill net—cotton twine that is ordinarily used for seines.

(No response.)

Q. You heard my question, didn't you?

(Testimony of Nels Sankala.)

A. What is that?

Q. Give me the name of one man on the Columbia River who ever used a gill net, web made for a seine, that is, cotton twine web. A. I don't know that.

Q. Don't you know it won't gill a fish at all?

A. I fished it gill net.

Q. You fished cotton twine in gill net? A. No.

Q. Will cotton twine gill fish in a net?

A. No; that was the first time I tried.

Q. You were trying to see whether it would do it?

A. Yes.

Q. That is true? A. Yes, sir.

Q. Did you know it would not do it?

A. I tried.

Q. Did you catch any fish in your other two set nets? [397]

A. No, I don't catch any fish.

Q. Never caught any fish at all there?

Q. You fished for two weeks?

A. Only one week.

Q. And never caught a fish?

A. I didn't stay; I don't know about the others already; I went there two or three times.

Q. You say some of the buoys were taken out by fishermen in their nets?

A. I didn't see that in the cotton net.

Q. Some of your buoys were taken out by the fishermen's gill nets as they drifted down the channel?

A. Some said they did and some said not.

(Testimony of Nels Sankala.)

Redirect Examination.

(Interrogated by Mr. DORR.)

I paid for my licenses every year; I paid the money to Mr. Hawkins, Superintendent of the Columbia River Packers' Association and I trusted him to get the licenses for me. I sold all of my fish that I caught on these grounds to the Columbia River Packers' Association. After that I fished for half in partnership with Mr. Tallant, during the last three years. I understood that the Government took charge of the island and of the shore, and that is what I meant that the Government owned it. I never heard that the Government owned the fish or the waters out there, or anything of that sort.

Here the defendants rested.

[Testimony of R. A. Hawkins, for Plaintiff (Recalled in Sur-rebuttal).]

R. A. HAWKINS, a witness on behalf of plaintiff, being recalled, testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.) [398]

I know Nels Sankala. I heard him testify that he bought the ground right occupied now by Site Number Three from the Columbia River Packers' Association through me. The facts are that when the Columbia River Packers' Association took over all the stock and the different supplies from the different companies, this was one that was put in my charge. There were two or three old seines and catboats and in order to dispose of those, I sold to Sankala for three hundred dollars or three hundred and fifty, I

(Testimony of R. A. Hawkins.)

would not say positive,—I think it was three hundred and fifty dollars. He was to fish on the ground according to my instructions and get all the revenue and pay all the expenses. The license was transferred from the Aberdeen Packing Company to me, in my name; I held the license from that time prior to the time the Government leased the ground. During that time, Mr. Sankala felt inclined once in a while to dispose of some of his fish at a half a cent more than the regular market, and I told him no, that ground was ours and he was getting full benefit, and if he did not give us all his fish I would put somebody else on the ground. He had a partner with him, Ernest Seaborg, and Ernest came to me and said, "Why can't you give the ground to me and turn over the license?" I said I could not do it, that the company would not think about it; Sankala got the outfit for nothing, but I said "as long as he fishes on that ground and gives us his fish, he can have the ground."

I made application to the State of Washington at that time for a license, signing the application myself, and sent the money myself. I charged that money up to Sankala's account as he was to pay all expenses. That is about all I know of it.

Q. What were the rights that the Columbia River Packers' Association sold, or was there any attempt to sell or convey them to Sankala?

A. None whatever, never thought about it.

All that Sankala had was merely to have the fishing privileges under my instructions, and if he did not deliver his fish to [399] my company, I would

(Testimony of R. A. Hawkins.)

have got somebody else who would; I would have fired him off, and he knew it just as well as I did. I settled with Sankala at the end of each season. I paid him off at the end of every season myself and paid him in cash. I did not know whom he employed. He employed whomsoever he desired. At the time we owned the ground, Sankala ran it himself, with the exception that Seaborg was a kind of a silent partner of his.

Q. About what profit, if any, did he make?

A. Some years his profits were light; he always had a long mouth and would tell me he did not make any money; that it all went for expenses. As a rule he did that. One season was pretty fair, and he said he had a good season and said, "I am going to give you a suit of clothes," and he did, because he had a pretty fair season; I think he had about seven thousand dollars' worth of fish, and I think his running expenses would be about thirty-five hundred dollars. He had a couple or three thousand dollars to pull down and it was to be divided up between him and I think a man named Jonnasen who had a little ground below this and fished it under the name of Jonnasen and Sankala; and he got some of it. Nels might have got twelve or fifteen hundred dollars for that season. The balance of the season he did not get much; maybe five or six hundred dollars after everything was paid up.

Q. That was for his season's work?

A. Yes, sir.

Q. Now as I understand, the Columbia River Pack-

(Testimony of R. A. Hawkins.)

ers' Association claimed the possessory right or squatter's right or whatever rights the others had to Site Number Three at the time the Government proposed to lease the same. We claimed the rights and we were never molested to amount to anything up to the time the Government sold it, and then we saw there was no more in it for us and we quit. [400]

Q. Do you remember who rented it?

A. That year I think it was Tallant.

Q. W. E. Tallant?

A. Yes, sir; he rented for three years; we did not bid high enough.

Q. In 1908? A. We got it that year.

Q. Tallant was not interfered with when he fished it? A. Yes.

Cross-examination.

(Interrogated by Mr. DORR.)

The Columbia River Packers' Association took over these concerns the year that it was organized—that is, 1899. I don't know how many concerns they absorbed; I think five or six; some of them were under my charge, together with the fishing outfits, and this was one of them. This one I speak of had been acquired by the Columbia River Packers' Association from the Aberdeen Packing Company. We got with the outfit two or three seines and I think one pretty fair fish-boat, and an old fish-boat and a lifting skiff or two. I know it was a very cheap outfit. The seines were pretty fair; they were not worthless; they could put in new parts. There were two or three of them. I could not tell the value; I never overhauled

(Testimony of R. A. Hawkins.)

them; I merely lumped them off to him. He told me that they were very poor after he overhauled them. I lumped them off to him for three hundred and fifty dollars. This included everything. This $350.00 was for everything, whatever the price was, he took everything that he could pick up belonging to the outfit; there might have been more stuff, I don't know; whatever he said went with me. He got everything we got from the Aberdeen Packing Company, in that line, at that place, and I procured a license in my name and charged him for it, he was to pay all the expenses. At that time we paid no rent for the shore. [401] He was simply permitted to take the place of the Aberdeen Packing Company, and he continued following that until the Government leased the shore. I don't know what became of the seining outfit after that.

Q. You said that you were in possession and would have enforced your power and prevented him from selling his fish at a higher price to anybody else?

A. Yes, sir.

Q. You claimed the right to buy his fish for your price?

A. We claimed prior right to the ground at that time.

Q. And would not permit him to sell his fish outside? A. No, sir.

Q. Did he ever sell any fish outside?

A. I don't know whether he slipped away with any; I heard that he did once in awhile, to get some whiskey.

(Testimony of R. A. Hawkins.)

Q. Your idea was to control the price?

A. No, sir. He agreed to fish the grounds at the regular market price.

Q. You fixed the market? A. No, sir.

Q. Your company did? A. No, sir.

Q. Who did?

A. The fishermen's union, I think it was at that time.

Q. Then in case anybody was willing to pay more, you would not permit him to sell to them?

A. No.

Q. That was the way you had the grip on him?

A. Yes, I had the dead mortal grip on him that way.

Q. And you enforced it? A. You bet I did.

Q. That was the general policy of your company, wasn't it? [402]

Q. It was the policy of the company as a business proposition.

Q. Now as a matter of fact you charged him three hundred dollars for that old seine?

A. Yes, three hundred or three hundred and fifty dollars.

Q. Just for the old seine alone? A. Oh, no.

Q. You rendered him a bill for it?

A. No, sir; I charged him on open account.

Q. And you settled with him at the end of the year?

A. Yes.

Q. And rendered him a bill?

A. A statement of his fish and everything.

Q. In which you charged him three hundred dol-

(Testimony of R. A. Hawkins.)

lars for that old seine?

A. I don't know whether it was three hundred dollars or three hundred and fifty.

Q. What is a new seine worth?

A. Five or six or seven hundred dollars, depending on the size.

Q. Is this statement the one that you rendered him?

A. No, sir; I never rendered this statement.

Q. Isn't that the statement from your office?

A. I cannot tell.

Q. Is not that the statement on which you settled with him?

A. Well, I don't know; this looks like the statement of the Columbia River Packers' Association.

Q. Don't you know that it is?

A. If I should say, I should say it was.

Q. Is there any handwriting of your own there?

A. No, sir.

Q. Not anything you can identify that by?

A. No, sir.

Q. But you do say it is a statement from the office?

[403]

A. Yes.

Q. And covering that purchase by the first item of the statement? A. Yes, sir.

Q. And that is one seine three hundred dollars?

A. Yes, sir; that is what it says: seine from A. P. Company.

Q. And the fish-boat is billed at fifty dollars?

A. Well, the whole thing went for three hundred

(Testimony of R. A. Hawkins.)

and fifty; it says seine and fish-boat three hundred and fifty.

Q. No, it says seine three hundred and fish-boat fifty dollars. A. Yes, sir.

Q. Is there anything else in that bill which came from that old outfit?

Mr. FULTON.—That is objected to; the bill speaks for itself, and the witness did not make the bill.

A. I don't see anything outside of that.

Q. Just those two items came from the Aberdeen Packing Company? A. Yes, sir.

Q. And the rest of the items your company furnished and charged to him?

A. I think so; unless they were ordered by him through some stores and charged to him.

Q. The next item is license thirty dollars?

A. Yes, sir.

Q. This statement shows a credit of $5,809.35 for fish for that year? A. Yes, sir.

Q. That is the amount of fish your company received from him from that place for that year?

A. Yes, sir.

Q. And if he sold any to outsiders it would be over and above that?

A. Yes, sir, but he didn't sell any outside. [404]

Q. Unless you could help it?

A. Well, I don't think he did; I have a pretty good eye on me for that kind of business.

Mr. DORR.—I ask that this statement be identified and received as Exhibit 25, as part of the evi-

(Testimony of R. A. Hawkins.)

dence of this witness.

Mr. FULTON.—No objection.

Whereupon, said document was received and marked Defendants' Exhibit No. 25.

Thereupon, each party rested, and the Special Examiner duly reported the above and foregoing testimony to the Court, and on May 5, 1912, an interlocutory decree was entered in the above-entitled suit, and pursuant thereto, the above cause was referred to M. A. Langhorne, Special Master, to take additional testimony and report his findings to the Court as to the amount of damages suffered by the defendants by reason of the injunction in this suit.

Thereupon, the following testimony and evidence was taken before the said M. A. Langhorne, Special Master, at Tacoma, in the State of Washington, on April 23, 24 and 25, 1912, that is to say: **[405]**

[Testimony of Frank Woodfield, for Defendants.]

FRANK WOODFIELD, a witness on behalf of the defendants, after being first duly sworn on oath, testified as follows:

My name is Frank Woodfield; I reside at Astoria, Oregon; I am a commercial photographer and art dealer; I have taken some photographs of the fishing ground in controversy in this suit; I have also taken photographs of most of the grounds on the lower Columbia River; I hold here in my hand some photographs which I have heretofore taken—some of them have been taken the last two or three years, I am not certain whether or not all were taken since 1908;

(Testimony of Frank Woodfield.)

they are all correct photographs from certain points looking certain ways and are photographs of fishing operations in front of Sand Island, in the Columbia River, that is, along the shore of Sand Island.

Thereupon, counsel for defendants offered said photographs in evidence.

To the introduction of said photographs, the plaintiff, by its attorney, objected on the ground that the same was immaterial and does not show, or tend to show, the measure of defendants' damages.

Said photographs were received and marked in evidence as Defendants' Exhibit "A," "B," "C," "D," and "E" and are hereunto attached and made a part hereof.

[Testimony of Amon Markham, for Defendants.]

AMON MARKHAM, a witness on behalf of defendants, after being first duly sworn on oath, testified as follows:

My name is Amon Markham; I reside at Ilwaco, Pacific County, State of Washington, and am by occupation a fisherman, and outside of the time I was deputy sheriff of Pacific County, I have been engaged in fishing for about 34 years in the waters of the Columbia River, Grays Harbor and Shoalwater Bay; I was deputy sheriff for Pacific County for 4 years, and with the exception of those 4 years, I have been engaged in the last 34 years in fishing for salmon fish and other fish in the Columbia River, Willapa Harbor and Grays Harbor, and also in Alaska; I [406] have fished in the waters of the Columbia River for the last 28 years, and for the last

(Testimony of Amon Markham.)

28 years, I have been acquainted with Sand Island, in the Columbia River, and the waters in front of it, and I am also acquainted with the waters in front of sites numbered 1, 2 and 3, on Sand Island, and I have fished in front of said Sand Island for salmon fish; that the names of some of the species of salmon fish in the Columbia River are steelheads, bluebacks, and Columbia River salmon; that I am acquainted with Mr. H. S. McGowan, Mr. J. P. Coyle, and Mr. Erick Lindstrom, the defendants in this case, and I have *been* their locations south of Sites 2 and 3, Sand Island.

Q. I want you to tell me this: South of and in front of sites, known as 2 and 3, Government sites on Sand Island, tell us what you know about the waters in the Columbia River at those places being valuable or not valuable for the catching of salmon fish.

Mr. FULTON.—I object to that as immaterial, irrelevant and incompetent; not evidence as to the measure of damages.

Mr. WELSH.—Q. You may tell us about it; you may answer the question.

A. Well, now, then, a question: Do you want me to answer where it is, the location—in what depths of water?

Q. You may do that.

A. I set the location, the place in the inshore, location stake, at one fathom, 600 feet, and 300 feet on shore.

Q. You place the defendants' location, the inner end of their location?

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(Testimony of Amon Markham.)

A. Yes, sir, 6 feet—one fathom.

Q. One fathom of water? A. Yes, sir.

Q. At extreme low tide?

A. Yes, sir, on the bank. [407]

Q. I say, at the extreme low tide you mean six feet? A. Yes, sir.

Q. Their locations were not inshore any nearer than that? A. Absolutely not.

Q. And extended out in the water for about what distance?

Mr. FULTON.—I object to that as immaterial. The only question in issue in this case is what damages you suffered by reason of our interference with your operating certain alleged set nets.

Mr. WELSH.—Q. You can answer the question.

(Last question read.)

A. One hundred fathoms, I should judge—600 feet. There are great quantities of salmon fish in the waters in front of said sites and in that particular location, and that such salmon is of commercial value.

Q. What was the market value of salmon during the year 1911—season of 1911?

Mr. FULTON.—I object to this, not within the order; all these matters were gone over thoroughly on the part of the defendant, and they are not within the order.

Mr. WELSH.—You may answer the question.

A. Well, do you mean to ask the question, provided where we fish upon the ground?

Mr. FULTON.—He is asking as to the commercial

(Testimony of Amon Markham.)

value of the salmon in the water.

A. Thirty-three and a third on the ground.

Q. While in the water?

A. After they are caught.

Mr. WELSH.—Q. After they are caught?

A. We get five on less than five pounds, and seven and a half for big salmon.

Q. You get how much per pound?

A. Five for small salmon and seven and a half for large salmon. [408] *A.* Yes, sir.

Q. Per pound? A. Per pound, yes, sir.

Q. That was the market value during 1911?

A. Yes, sir, market value for 1911, so help me God.

Q. Wasn't the price of salmon six cents?

A. No, sir, some of them got six cents; we got five.

Q. Have you ever operated set nets?

A. Yes, sir; I have operated set nets in Shoalwater Bay, Columbia River, and also Baker's Bay.

Q. Have you ever— A. But I say five cents.

Q. You got five cents for all?

A. No, no, that is on small salmon; I correct my statement, six cents and seven and a half.

Q. Do you remember what the price was in 1910?

A. In the Columbia River?

Q. Yes, sir. A. Yes, sir.

Q. What was it?

A. Six cents, cold storage they were seven and a half cents.

Q. Cold storage? A. Yes, sir.

Q. Assuming that in the year 1911 the drag seine

(Testimony of Amon Markham.)
that was operated by the plaintiffs caught 363 tons of salmon fish—

Mr FULTON.—What year?

Mr. WELSH.—For the season of 1911. Or was it 360 tons, how many tons of salmon fish, in your opinion and judgment, could be caught on those locations, in those waters, with set nets?

Mr. FULTON.—I object to that on the ground that the witness is incompetent, has not shown he has any knowledge that a set net would catch a fish on these grounds. He has never known [409] or heard of anyone operating set nets there.

Mr. WELSH.—You may answer.

A. If I had the privilege of running a set net, given the jurisdiction of Sand Island, I certainly know what I could do. I know what I could catch as a practical fisherman; I know what I could do.

Q. You do? A. I certainly do.

Q. Then you may tell me.

A. I believe if I had the proposition of operating set nets there during the months of June and July, I could catch in the neighborhood of 35 tons.

Mr. FULTON.—I move to strike out this testimony as immaterial, irrelevant and incompetent, and not the measure of damages.

Mr. WELSH.—Q. You mean for each set net?

A. No, no.

Q. Now, suppose that the drag seine caught 360 tons?

A. I would operate as much as I would be allowed.

Q. Suppose you could operate set nets there—

(Testimony of Amon Markham.)

A. And give me the jurisdiction—

Mr. FULTON.—You mean give him the whole ground?

Mr. WELSH.—Yes.

Q. How many tons of salmon would you catch in your set nets?

Mr. FULTON.—I object to that as incompetent, not within the issues and not the measure of damages.

A. Why, if I was to operate according to the way the ground is laid out, 18 to 36 set nets, I believe that I would almost catch as much as I would with a drag seine.

Q. In other words if you were permitted to operate and fish those grounds in front of Sites 2 and 3 with set nets, that out of those waters you would catch nearly as much as you would with a drag seine? **[410]**

A. Absolutely.

Q. And if the drag seine caught 360 tons you would catch that many.

Mr. FULTON.—I submit that Mr. Welsh should take the stand.

Mr WELSH.—I know it is leading; I will reframe that.

Q. Suppose that you had the right to fish with set nets in the waters of the Columbia River in front of Sites 2 and 3, and suppose that during the year 1911 that a drag seine caught in the neighborhood of 360 tons, how many tons of salmon, if any, would you catch with your set net?

(Testimony of Amon Markham.)

Mr. FULTON.—I object to that as incompetent and immaterial, and not the rule for the measure of damages.

A. The appliance that I would use, I would catch approximately over two-thirds of what they catch—over two-thirds.

Q. You would catch over two-thirds of what was caught? A. Yes, sir, I would guarantee that.

The SPECIAL MASTER.—Does he mean two-thirds as many tons?

A. Yes, sir.

Mr. WELSH.—Q. If they caught 360 tons you would catch two-thirds more?

A. Yes, I would guarantee that, I know that.

The SPECIAL MASTER.—Q. Two-thirds of 360?

A. Yes, sir.

Mr. WELSH.—You said over two-thirds, didn't you?

A. Yes, sir.

Q. You said you was not familiar with the waters in front of the sites? A. I certainly am.

Q. Have you fished those waters?

A. Well, I should say yes; I have answered that question once; very familiar with it.

Q. Did you ever operate set nets in the Columbia River? [411] A. Why, yes, I have.

Q. For catching salmon fish? A. Yes, sir.

Q. From your knowledge and experience as a fisherman you may state whether or not in front of Sites 2 and 3 in Sand Island—the waters of the Columbia River—set nets could be operated for the catching of

(Testimony of Amon Markham.)

salmon fish. A. I should say yes.

Q. Would it or would it not be practicable to fish in front of these sites with set nets for the catching of salmon fish?

A. Undoubtedly; give me the privilege and I will show you.

Q. In the operation of set nets in front of those sites, from your knowledge and experience as a fisherman, and from the knowledge and experience that you have of the grounds, the location in controversy, you may state whether or not it would be practicable to fish those locations without going upon the tide lands, or the outlands in the operation of your set nets.

A. Do I understand you to mean to say could I land a seine inside without going ashore; is that what you mean?

Q. That is practically what I want to know. You may answer that.

A. Why, certainly; I have done it in the water this deep (indicating).

Q. Nearly to your shoulders? A. Yes, sir.

Q. Well, now, in the operation of set nets there, for the purpose of catching salmon fish, would it be necessary for you to go upon the tide land?

A. No, sir.

Q. Tell me—

A. We do not catch them on the drift logs, we catch them in the water.

Q. Tell me how. **[412]**

A. We manipulate them with anchors, the use of

pulleys or the use of a collock.

Q. How do you get the fish out of your nets without getting on the land?

A. We have a boat; and you surely would not run a boat in among the rift logs.

Q. Would you go on the tide lands?

A. Why, certainly not; no fish run upon the tide lands.

Q. Explain to the Court how you would operate your set nets without using the lands, tide lands, or whatever you call it, above extreme low tide.

Mr. FULTON.—I object to that as incompetent and immaterial, and not within the issues.

A. Why, in the first place, if I was to put out set nets I would use a collock, made of rock, and we place them on and anchor our set nets.

Q. That did not quite answer my question. I want to know how you would operate those nets, how you would get your fish out of them, and how you would market your fish? A. With a boat.

Q. Without going upon the lands or tide lands.

A. Never go on land at all—absolutely on no land, we would go on the boat, gasoline boat. We could not fish there with a sail-boat now, so far as the water and everything is concerned, we would go there with a gasoline boat.

Q. Now, you have stated that you know those waters? A. I certainly do.

Q. And those locations? A. I certainly do.

Q. And from your knowledge and experience as a fisherman, and knowledge and experience you have

(Testimony of Amon Markham.)

had in the operation of set nets, do you mean to say that those locations in the waters of that river in front of those sites, could be fished [413] with set nets?

A. Why, certainly, you could use set nets; give me the show.

Q. During the many years that you have been engaged in fishing in the waters of the Columbia River, do you know what the value of fishing locations are?

A. You mean the rental value?

Q. I mean the rental value.

Mr. FULTON.—I object to that.

A. Thirty-three and a third per cent.

Mr. FULTON.—I object to that as incompetent and immaterial. It is not what other fishing locations of this same character are worth.

Mr. WELSH.—Q. You say 33⅓ per cent?

A. That is the rental proposition on individual gear.

Q. I want you to explain that to me fully.

A. If you are not—if I rent a gear from the cannery it is 33⅓ per cent profit to them; 66⅔ per cent goes to the manipulator, the man who manipulates the game.

Q. Operates it? A. Yes, sir, operates it.

Q. Suppose for the purpose of illustration—suppose I had exclusive rights to fish in the water of the Columbia River in front of these two sites, and I wanted to give or rent to someone the privilege for a year of operating on those grounds, what rental would I receive?

(Testimony of Amon Markham.)

Mr. FULTON.—I object to that on the ground that the witness is incompetent; he has not testified he knew what the value on the rental was.

Mr. WELSH.—Q. I will ask you if you know what the rental values are.

A. Thirty-three and a third per cent.

Mr. FULTON.—Q. Do you know of any set net sites being rented **[414]** on the lower Columbia River? A. I do.

Q. Where?

A. Why, take it on the grounds—the Grant and Dillon grounds.

Q. Grant and Dillon grounds, set nets?

A. No—

Q. I am talking about set nets, Mr. Markham. Please keep that in mind, set nets. I do not want to talk about anything else. Please answer the questions; confine yourself to set nets. Do you know of any man renting or paying anything for the purpose of operating a set net on the Columbia River? A. Yes, sir, I have.

Q. Who? A. I can show you—

Q. I said who? A. Mr. Brown, for one.

Q. Who did he rent it from?

A. I don't know, Mr. Fernburg, I believe.

Q. He rented a set net location from Ferburg?

A. Yes, sir.

Q. Where? A. I don't know.

Q. That was about 1860 or '70?

A. In all probabilities it was.

Q. It might have been 1860 or 1870?

(Testimony of Amon Markham.)

Mr. FULTON.—I object, the witness is incompetent.

Mr. WELSH.—Q. Mr. Markham, do you know where parties have the exclusive right to a fishing location—

Mr. FULTON.—I did not understand the question.

Mr. WELSH.—Q. Where parties have the exclusive right to a fishing location and rent to someone else for a year, do you know what amount they pay for the rental value? **[415]**

Mr. FULTON.—I object, in the first place the witness is incompetent, and in the second place, the proposition is a set net at the particular place; the witness is incompetent and the question is incompetent.

Mr. WELSH.—We have a right to fish these locations.

Mr. HADLEY.—We are trying to determine what the rental value is.

Mr. WELSH.—Q. You may answer the question. I asked you if you knew what the rental value was,—was paid for fishing locations in the waters of the Columbia River.

A. Well, now, I answered the question. I want to demonstrate the fact this way: The price or value is put upon it but naturally it is 33⅓ per cent of the valuation of the fish—what we pay, provided we furnish the gear.

Q. Do I understand you to mean this, that the rental value is one-third of the gross catch of the location? A. Yes, sir, yes.

(Testimony of Amon Markham.)

Q. It is one-third of the gross catch of the location?

A. Yes, sir.

Q. If you are going to rent a fishing location from me, you determine the value, what it will be per annum, of one-third of the gross catch?

A. Yes, sir.

Q. Has that been the rule?

A. That has been the rule.

Q. And that applies to all kinds of locations?

A. It don't make any difference whether you are fishing with a gill net, a drag, or anything else, where the company gets behind you itself.

Q. That is the rule? A. Yes, sir.

Q. That is the fact? A. Yes, sir. [416]

Mr. FULTON.—Let the witness testify.

Mr. WELSH.—You appreciate the fact—

Mr. FULTON.—He can testify satisfactorily without you leading him.

Mr. WELSH.—Q. Then, Mr. Markham, suppose that these locations in front of Sites Two and Three, that during the season of 1911, we will say, there were 360 tons of salmon fish caught, what would you say then the annual rental value of these locations are?

Mr. FULTON.—I object to that as incompetent and immaterial. It is a hypothetical question and not based on any evidence in this case.

A. I should think fifty per cent of the amount put in would—

Q. Would be the reasonable market value?

A. The reasonable market value.

Q. Rental value? A. Yes, sir.

(Testimony of Amon Markham.)

Q. Per annum?

A. Yes, sir, I should think so; and I would be willing and glad to do it.

Q. Now, Mr. Markham, with reference to the number of fish that would be caught for the various years, from July, 1908, on the fishing locations in controversy, would you say the catch of the fish and the valuation would compare with the year 1911, the fishing season of the year 1911?

Mr. FULTON.—I object to that as immaterial and incompetent.

A. Well, if I was to figure—if I was to go out and put out the appliance that the fish—the appliance on Sand Island, I would figure on 66⅔ per cent. That ain't what they done, but my own individual appliance, fifty.

Q. What do you mean by 66⅔?

A. That is what I would give.

Q. That is what you would give for the rental value? [417]

A. Yes, the rental value, and give them the same appliance; but if I am manipulating myself I would do it, I would give fifty.

Q. If there was 360 tons of fish caught during the fishing season of 1911, how many tons would you say could be caught in the fishing season of 1910?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial. The witness is incompetent.

Mr. WELSH.—Q. Is there any way of determining, if you know the catch for one year, is there any

(Testimony of Amon Markham.)

way of determining the catch for another year?

A. It is subject to the facts, you could not tell just what you could do; you might put in more appliance.

Q. You do not quite understand me. Assuming that there was about 360 tons of salmon fish caught there in the fishing season of 1911? A. Yes, sir.

Q. How many tons, could you say could have been caught in 1910 with the fishing gear?

Mr. FULTON.—Same objection.

A. Why, I believe in my mind I could catch more fish than anybody I have seen. Is that a fair question?

Q. That is not answering my question.

(Last question read.)

A. Nothing.

Q. You mean to say then—do I understand you to say that if there was 360 tons caught on these locations in the fishing seasons of 1911 that you would not catch anything there other years?

A. No, absolutely not; I could double the amount, yes. I understand the question—you bet I can.

Q. Then assuming that there were 360 tons of salmon fish caught in the fishing season of 1911 on these locations, is there any [418] way of determining or judging of the number of salmon fish that would be caught in the prior year?

A. Well, now—what are you going to put a man to?

Q. Were you familiar with the run of fish on the Columbia River in 1911? A. Yes, sir.

(Testimony of Amon Markham.)

Q. How did that compare with the run of fish in 1910?

A. Never compared with 1910; we had a bigger one last year.

Q. How much bigger? A. Lots bigger.

Mr. FULTON.—Q. You mean you had a better run in 1911 than in 1910? A. Yes, sir.

Q. You had a bigger run in 1911 than you had in 1910? A. Yes, sir, I can show you that.

Mr. WELSH.—Q. How did they run in 1909 compared with 1910? A. Small again.

Q. Small in 1910? A. Yes, sir.

Q. 1908? A. 1908 was better than 1909.

Q. 1908 was better than 1909?

A. Yes, sir.

Q. How would it compare with the run of 1910?

A. Apparently about the same.

Q. Then in 1908, the run of 1908 was practically the same as 1910? A. Yes, sir.

Q. 1910 was equally as good, if not better, than the run of 1911? A. Just about.

Q. By run you mean the number of fish—

A. Number of fish caught on the grounds where the fishing grounds are. **[419]**

Cross-examination.

I used to own quite a number of fish traps or set nets, but I own none now. I am working for myself; I am a fisherman and have my own boats and nets and am engaged in gill netting and set netting. My nets are on the Nasel River—that is, over on Shoalwater Bay, in Pacific County, Washington. I have oper-

(Testimony of Amon Markham.)

ated set nets in the Columbia River, in Baker's Bay all the way from Fort Canby to Fort Columbia. The reason I quit was that when a man finds out that when he sets a net out he quits. I have not yet quit, however, I am still operating set nets in Baker's Bay at the time the season opens. I have one set net in Baker's Bay now. I operated it last year. It is located down at what they call "Oklahoma Channel" in Oregon. I caught five salmon in it last season. I did not operate it, however, the whole season. I think I operated it three or four nights in the month of May. I don't exactly know why I quit—I paid my license, but I operated only three or four nights. The reason why I quit was for the reason that I thought it was in the way and I thought it would justify me in doing it. Oklahoma Channel is in front of Sand Island. It is on the west side of the island. The water is different on the west side than on the south side. The current is swifter on the south side than on the west side.

Q. Now, supposing, Mr. Markham, that under the laws of Oregon, that anyone could go in there and put in a set net any place he wanted to in front of that land, how much would you give for the privilege of operating a set net in front of it?

A. May I answer the question?

Q. Answer any way you want to.

A. I place the—shall I answer, Mr. Welsh?

Mr. FULTON.—Q. Answer the question. I want you to answer my questions.

Mr. WELSH.—I will have you tell me.

(Testimony of Amon Markham.)

Mr. FULTON.—You can tell him after, when you get on the outside.

(Last question read.) [420]

A. What would I give?

Q. Yes. A. Where this set net I put—

Q. I am speaking of the set net placed by Mr. McGowan in front of the sites numbered 2 and 3 on Sand Island; supposing at those points where you saw those set nets anyone who had a license—

A. I never said that.

Q. Wait a minute. Suppose anyone who had a license, had the right under the laws of Oregon to put all the set nets he wanted to in there, and you would not have the exclusive right, how much would you pay to put one set net in there—how much would you pay for it?

Mr. WELSH.—Objected to as incompetent, irrelevant and immaterial, for the reason the Court has decided in this case that we had the exclusive right to operate those set nets and to fish on those locations.

A. If I had the opportunity of working those grounds?

Mr. WELSH.—I wish to make the further objection that the question states a state of facts not analogous to the case here.

(Last question read.)

A. That is a question of how much I would pay, exclusive right?

Q. No, no. Just the same right as anybody else to put one in any distance you wanted to; suppose under the laws of Oregon there was no lateral passage; if

you put a set net in anyone would have a right, see you making money, to put one in in front of you any distance they saw fit, what would be a fair price to operate a set net under those conditions?

Mr. WELSH.—We also make the objection, in addition to the ones we have made, that the question assumes the law to be other than it is. The law in any State would not permit the interference with an official location by another person, but that equity [421] would enjoin such interference; and the question assumes a state of facts which does not exist; and it is not analogous to any of the facts in this case.

A. Why, in answering that I think a man is justified, where he pays his license to the State—

Q. I want you to tell me in your judgment whether a set net location under those circumstances would be worth anything at all.

A. Why, it certainly is.

Q. Just keep your seat now. How much is it worth if anyone else has the right to cork it?

Mr. WELSH.—Same objection.

Q. Suppose anyone would have the right to cork you, what would be the value of your set net location?

A. What do you mean?

Q. Don't you understand corking, what corking means? A. I certainly do.

Q. Suppose that any man under the laws of the State of Oregon who had a license could put a set net within 25 feet on either side of Mr. McGowan's set nets, as you saw located there, how much would they be worth per annum?

(Testimony of Amon Markham.)

Mr. WELSH.—The defendants make the same objection.

Mr. FULTON.—I understand the same objection goes through to that.

A. There is no such a law on record.

Q. You swear there is no such a law in Oregon?

A. Yes, sir; 300 feet is what the law is.

Q. You are just as sure of the fact that is the law in Oregon, that no set net can be placed within 300 feet of you, as you are of everything else you have testified to in the case?

A. That is according to my understanding. I do not want to buck anything unless I understand it.

Q. Don't you understand my question? [422]

A. I am saying I understand 300 feet is the law.

Q. I am simply saying, assuming it to be a fact that under the laws of Oregon there is no provision against putting one set net right up alongside the other, providing the two people have licenses, assuming that is the law, how much would the right to operate a set net in front of Sand Island, in front of Sites 2 and 3, be worth?

A. Why, there is no question; I cannot answer any such question as that.

Q. You cannot answer it?

A Certainly not; if you have no law, how can I answer it?

Q. Assuming that under the law—

Mr. WELSH.—Same objection.

A. I cannot answer where there is no law.

Q. I am assuming there is no law, would that right

(Testimony of Amon Markham.)

to operate one set net there be of any value at all—or any number of set nets there—as long as anybody else had a right to operate—

A. Yes, sir, if you can under the law, if the law is behind me.

Q. There is no—

Mr. WELSH.—Same objection.

Mr. FULTON.—Q. Assuming there is no law which prohibits one set net from corking another under the laws of Oregon, what would be the value of a set net location there?

A. Never saw such a law.

Q. I do not care whether you did or not. You answer that question, or I want to know the reason why. I am simply trying to ask you, Mr. Markham; you will answer that question.

A. How am I to answer, Mr. Welsh?

Mr. WELSH.—Q. Do you understand the question? A. I do not.

Mr. WELSH.—Let me put the question. [423]

Mr. FULTON.—Let us adjourn until Mr. Langhorne comes.

Mr. WELSH.—The witness does not refuse to answer the question.

A. I did not refuse to answer anything in fairness.

Mr. FULTON.—Well, we will wait until after lunch, and I will get an answer to that question.

An adjournment taken.

The cross-examination of AMON MARKHAM was resumed by Mr. Fulton, as follows:

Q. The question I was trying to explain to you, Mr.

(Testimony of Amon Markham.)

Markham, before we adjourned was, just supposing if under the laws of Oregon no one could get the exclusive right to operate set nets in front of Sand Island, Sites 2 and 3, and that after one had a set net there, we will suppose there was no law against any other party coming in and setting a net anywhere he wanted to, what would you say as to that right being of any value to anybody?

A. You want me to answer the question in recognition amongst the fishermen?

Q. No, answer the question I asked.

Mr. WELSH.—Answer the question in your own way.

Mr. FULTON.—You can answer the question and make any explanation afterward.

A. Yes, subsequently we have; assuming rights, we have a right.

Q. I am not asking that at all. You know what that question is? A. Yes, sir.

Q. Answer it.

A. I will answer the question this way. I think we have a right, we have.

Q. Yes?

A. And every man has a subsequent right.

Q. Supposing he don't have that right, what then?

A. We use that. [424]

Q. Assuming you do not; if you do not have that right? A. We make that a law among ourselves.

Q. Supposing a lot of fellows came in and would not listen to that and put in set nets anyhow, and the Court said they had a right to, what then?

(Testimony of Amon Markham.)

A. I don't know what would happen.

Q. Don't you know it would be of no value at all?

A. I know it would be as much value to me as anyone else.

Q. Would it be valuable to anybody else if a party came in and does the same thing you are doing?

A. They are subject to their right, we appreciate that.

Q. I am not asking that.

A. Haven't I answered your question?

Q. No, you have not. I do not care what you think your rights are. If under the law of Oregon—and that property is in Oregon—if under the law of Oregon anyone had the right to go in there and put their set net in front of yours any place they wanted to, what then would your right to operate a set net there be worth?

A. Not if they got jurisdiction.

Q. It would not be worth anything?

A. No, I don't say that.

Q. What do you say?

A. We fish among each other.

Q. I do not care about that. I am saying, supposing some people had the same right to do it and that they did do it, what then?

A. Then a man would take his chances.

Q. Yes; and you might have 100 set nets there?

A. In all probability.

Q. Would your set net right be of any value with 100 set nets in there? [425]

A. I think so.

(Testimony of Amon Markham.)

Q. How much would you pay for the right to operate one set net there, we will say? Supposing we would give you a right to operate nine set nets there, yet anybody else could put in 100 more if they wanted to?

A. I do not think the State of Washington—

Q. I do not care what you think about it. How much would you be willing to pay for a right to operate a set net there provided 100 other men came in there and put their nets alongside of you, wherever they wanted to? A. Well, you are—

Q. Answer the question. A. What question?

Q. Don't you understand the question?

A. No, I don't. How much will I pay for the ground?

Q. Supposing now that I had a set net there in front of Sites 2 and 3; supposing you had nine set nets; and I should come to you and say, "I have a set net in front of Sand Island"—and you had the money to pay for it—and I should say, "How much will you give me for this set net location?" Now, you have these nine set nets, and there are 100 other men have set nets along there too, and they have a right there to operate their set nets the same as you and I—how much would you pay me for mine?

A. With a guarantee that I am not going to be molested?

A. You will be molested.

A. Then I could not put a valuation on it.

Q. Do you know whether it is worth anything or not? A. Sure it is.

(Testimony of Amon Markham.)

Q. How much is it worth?

A. Well, I would take my chances on running, if I had the south of Sand Island; I would be willing to pay $2,800.00. [426]

Q. And let anybody else come in that wanted to?

A. Yes, sir.

Q. Let 100 men come in there?

A. Don't make any difference.

Q. If they put a set net in front of you ten feet, it would make no difference to you?

A. I would run my chances.

Q. Then, there is about 7 feet then, isn't there?

A. Yes, more than that.

Q. So you would have 9 set nets, and if the other set nets were set about 10 feet apart there would be about 200 of them along there, and you would be willing to pay $2,800.00 for one?

A. Yes, exclusive right.

Q. Did you ever operate a set net there?

A. I never did on the south of Sand Island.

Q. You do not know whether you could catch a fish or not? A. I absolutely know I could.

Q. You never tried it? A. No, sir.

Q. You never saw anybody else operating it?

A. Yes, sir, some gentleman from Chinook, three of them; I don't know their names; they operated set nets there.

Q. You do not know their names or the year they operated? A. No, sir.

Q. All hearsay with you?

A. I know they did; it is hearsay. I never oper-

(Testimony of Amon Markham.)

ated one, if I had I would tell you.

Q. You do not know of your own knowledge of anyone else having operated there?

A. I know they did.

Q. You heard they did? A. Yes, sir. [427]

Q. You do not know the names of the men?

A. No.

Q. Did you ever hear of their names?

A. I have heard talk of them.

Q. Never heard anybody mention their names?

A. No, sir.

Q. You never saw them there?

A. I never was over there when they were operating.

Q. You tried to operate one set net on Sand Island? A. Not on the south side.

Q. On the west side?

A. On the west side, I have, yes, sir.

Q. During all that time you have never known, of your own knowledge, of anyone attempting to operate a set net there?

A. As I told you, I know they have been, but I don't know the gentlemen's names, never made it my business to know.

Q. Never even heard the names of the gentlemen?

A. I know they have been.

Q. Something in the air has told you?

A. Nothing in the air at all.

Q. You do not know the names of the men?

A. I never made it my business to know, Mr. Fulton.

(Testimony of Amon Markham.)

Q. You say you never even heard the names of the men? A. I say that I don't know their names.

Q. You never heard their names, that is what you said? A. I don't care about that.

Q. You never heard their names?

A. I don't know, I don't care to.

Q. You never saw them? A. No, I have not.

Q. You gill netted along there—how many years have you been gill netting along the shores there of Sand Island? **[428]**

A. Well, I have been away from Sand Island when I was four years in Alaska, and I am four years in South Bend; outside of that I have been gill netting all my life and trapping.

Q. During all that time you never saw a set net there? A. Absolutely none on the south side.

Q. The only people that used the waters in front of Sand Island for fishing purposes were those engaged in gill netting and those engaged in seining?

A. Well, now, I won't say that, because I told you I don't know these people.

Q. I am talking about what you saw.

A. No, I absolutely didn't see it.

Q. During all the years you were there you never saw anyone attempting to fish the waters in front of the south shore of Sand Island, other than gill nets?

A. On the south side?

Q. On the south side, other than gill netters and seiners.

A. No, I never saw a set net there, for practically the last twelve years the south shore of Sand Island

(Testimony of Amon Markham.)

has been used as seining grounds.

Q. Now, during that time how many set nets do you know of, of your own personal knowledge, not what you have heard, were operated on the lower Columbia River?

A. On the lower Columbia River?

Q. Yes.

A. Why, I do not know, there is a question I won't answer, because I don't know.

Q. Well, can you recall one?

A. No, I would not answer that—only one of my own, I have operated a set net a few days during the early spring, that is all.

Q. Just a few days?

A. Yes, sir; I would not tell you something I do not know. **[429]**

Redirect Examination.

I consider Oklahoma Channel as inferior for fishing to the south shore of Sand Island. The fish are more numerous on the south shore. If I should be permitted to operate a set net on the south side of Sand Island, I know as a practical fisherman that I could catch salmon fish. If I had the front of Sites 2 and 3 in the Columbia River, I think I would make about $7,000.00. I only operated my set net in the Oklahoma Channel three or four nights and caught five salmon, and I discontinued, because it would not pay, and I did not consider Oklahoma Channel a good fishing location.

Thereupon, counsel for defendant asked the witness the following questions:

(Testimony of Amon Markham.)

Q. Suppose that during the year 1911, fishing season of that year, and prior years, in front of Sites 2 and 3, in the waters of the Columbia River, south of Sand Island, there were no set nets excepting the defendants', what in your opinion was the annual rental value of that location?

Mr. FULTON.—I object to that as incompetent and immaterial, not the proper measure of damages.

Mr. WELSH.—Q. Do you understand the question?

A. Yes, sir. Now, to answer the question as a practical fisherman, give me the privilege of fishing this location.

Q. I said, assuming there were no corking, that you had the exclusive right—no nets there but yours; based on that?

A. Twenty-eight hundred dollars, I would give for the ground.

Q. Each year? A. Yes, sir.

Q. For each one?

A. For each one of the locations; mark you, there would be no competitor, you see?

Q. I assume that. Now, take it during the year, say, from July, [430] 1908, during the fishing season, including the year 1911, was there any person or persons corking south of Sand Island, in front of Sites 2 and 3?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial.

A. Was there corking?

Q. Yes.

(Testimony of Amon Markham.)

A. You mean to say, laying out their nets outside of the "Republic"?

Q. Was there any interference there with parties fishing by other parties fishing?

A. Every fisherman gets the right to net.

Q. What is the custom of fishermen, respecting the rights of locations of each other?

A. You mean the drift net?

Mr. FULTON.—Set net.

Q. What has been the custom?

A. Three hundred feet.

Mr. FULTON.—I object to that as immaterial.

Mr. WELSH.—Q. I will first ask you, do you know the custom of fishermen on the Columbia River with reference to whether or not they respect the locations of each other? A. I am sure they do.

Mr. FULTON.—I object to that as incompetent.

Mr. WELSH.—Q. What has been the custom of the fishermen on the Columbia River with reference to respecting the locations of a prior locator?

A. According to law.

Mr. FULTON.—I object to that as incompetent.

Mr. WELSH.—Q. I do not care about the law.

A. According to law—this law requires them to respect it.

Q. What has been the habit or custom of the fishermen on the Columbia River with reference to respecting the prior location **[431]** of the other fisherman; do they cork him or do they leave him alone?

A. Why, certainly, they don't cork him, they leave

(Testimony of Amon Markham.)

him alone; they respect each others' rights. Go out upon the water and if a man don't respect the other man, where would you be? Of course, they respect each other.

Recross-examination.

Q. So you think that you would be willing to pay $2,800.00 a year for each set net that Mr. McGowan had in front of Sites 2 and 3 on Sand Island during the year 1908, 1909, 1910, and 1911. You think that would be a fair rental value, do you?

A. I think so.

Q. He had nine of them, that you remember?

A. I don't know what he had. If you give me that location I will give you that money.

Q. That would be $25,200 if he had nine of them?

A. I don't know anything about what he had.

Q. You said they were 300 feet apart?

A. I don't know where they were.

Q. Set net locations are supposed to be 300 feet apart? A. That is the Oregon law.

Q. In 3,000 feet there would be nine locations?

A. Yes, sir.

Q. That would be $25,200, which you think would be a fair price to pay for the rental right in front of Sand Island? A. Yes, sir.

Q. That is your judgment?

A. Yes, sir. I did not say I would pay $25,000.00 for the entire ground—I said I would pay $2,800.00 for each Site One, Two and Three on the ground, that is, each site. I mean each set net. The reason why I didn't put a set net on these grounds is, that I have

(Testimony of Amon Markham.)

[432] no money to drive these locations and put in these set nets, but I would give this money if I could. It costs probably $1,000.00 to put in one set net location and operate it. The only reason why I did not put in a set net location was that I could not raise the $1,000.00, and I did not ask anyone to loan it to me. I do not know whether I could have borrowed the money or not, and I never inquired from anyone whether he would back me or not. I have figured many times about putting a set net in there, but I never talked with anyone who had the money to put in a scheme like that. During these years, I have had money to put in a hundred of them, if I wanted to get the money. I would not put it in myself, for the reason a fisherman is not going to advance himself. Of course, I put in my own set net in the Oklahoma Channel.

Redirect Examination.

(By Mr. WELSH.)

Q. Mr. Markham, knowing that the plaintiffs were using and occupying this territory south of Sand Island, would that fact deter you and others from attempting to put in fishing gear there?

A. Why, certainly.

Recross-examination.

(By Mr. FULTON.)

Q. Then, people all knew that the Columbia River Packers' Association was using this as seining ground, didn't they? A. I suppose they did.

Q. McGowan knew it, didn't he?

(Testimony of Amon Markham.)

A. I don't know.

Q. So McGowan, when he attempted to put those set nets in there, was not respecting the prior rights of other fishermen, was he?

Mr. WELSH.—We object to that question and move to strike it out for the reason it assumes a state of facts which the Court in **[433]** this particular case has decided against; for the reason that the counsel is assuming in his question that the Columbia River Packers' Association had a prior right to fish there, and that they were fishing when the defendants put in their fishing gear; whereas, the Court has found as a matter of fact that the defendants had a prior and exclusive right to fish there, and that the plaintiff, the Columbia River Packers' Association, was a trespasser, and that it did unlawfully tear up and destroy the defendants' fishing gear, and that it came on to the ground subsequent to the time of the location of the defendants' fishing gear; and the question is entirely immaterial.

A. You have plied so many questions against me—

Q. You said the reason why you did not put—one of the reasons you did not put a set net in front of Sites 2 and 3 was because the Columbia River Packers' Association had a prior right? A. I did.

Q. Or was using it as a fishery; didn't you say that? A. I did not.

Q. You are positive you did not say that?

A. I am positive I did not.

Q. Didn't Mr. Welsh ask you this question: One of the reasons why you did not attempt to put in a set

(Testimony of Amon Markham.)

net was because the Columbia River Packers' Association had a prior use? A. No.

Q. He did not? A. No.

Q. Who had?

A. I don't know; I say I had no right there.

Q. But that they had the prior use?

A. If they had the privilege of the ground, I had no right there, and I could not put in my money, as a poor man and a common fisherman go to work and tire them out. **[434]**

Q. That was the only reason, was it?

A. Subsequent to the fact that I didn't have the money of my own to buck them people, McGowans and the combine, or either of them.

Q. You say it has only been the last 12 years they have used this for seining ground at all, and before that it was not occupied. Why didn't you use a set net there before that?

Mr. WELSH.—I object to that as being immaterial.

Mr. FULTON.—Q. Before that, when nobody was occupying it. Why didn't you put a set net in there then?

A. *I* would be a nice "howdy-do," a poor fisherman going to work bucking a company like McGowans or the combine.

Q. I am talking about before McGowans, or what you please to call the "Combine" had anything to do with it. Why didn't you put a set net in then?

A. Why didn't I?

Q. That is the question. A. "Holy mother."

(Testimony of Amon Markham.)

Q. That was the only reason then—you did not want to make any money? A. No.

Thereupon, counsel for defendants moved to strike out all the testimony of the witness with reference why he did not put in fishing gear south of Sand Island, on the ground that it is wholly and entirely immaterial and on the ground that the Court has found in this case the defendants had the prior and exclusive right to do that.

[Testimony of Ralph Grable, for Defendants.]

RALPH GRABLE, a witness produced on behalf of the defendants, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. J. T. WELSH, of Counsel for Defendants.) **[435]**

My name is Ralph Grable; I reside at Ilwaco, Pacific County, State of Washington; I have lived there 23 years; I am 34 years old; I am a fisherman by occupation; I have been fishing since I was 15—that would make it about 19 years. In the first place, I was a trap fisherman for Columbia River salmon on the Columbia River. My fishing operations have not altogether been on the Columbia River. I have fished on Shoalwater Bay, or Willapa Harbor, as you may call it. I have fished on the Columbia River since I was 15 years of age. In the fall of the year, I was up there in Willapa Harbor; in the summer, I fished on the Columbia River. In the first place, I was using traps, and then set nets, and then gill nets, and then purse nets.

(Testimony of Ralph Grable.)

The only difference between a gill net and a set net is determined, as I can see it, one is made fast by appliance and the other drifts as the tide takes it, either to or fro. The difference is that a set net is anchored, and a gill net is not anchored—that is the only difference. The difference between a gill net and a seine is that a seine surrounds the fish and drags in to the shore, where a gill net the fish goes with his head into the mesh and there he stops.

I am familiar with the location of Sand Island, and I am familiar with fishing operations in front of Sites 2 and 3. I have fished there every season since 1901, and during that time, I have been familiar with the run of fish there. I fished there during the season of 1911, or in that immediate locality. There was an extra run of fish during the season of 1911—an extraordinary run of fish during that year. I should say an increase of 20% over the previous year. The year 1909, as near as I can remember, I think it would not exceed one or two per cent either way, and it might exceed 5% either way as to the year 1908. Not keeping track of the whole business, not having that business in mind altogether, but I do not think that the season, I mean the **[436]** fishing season, exceeds five per cent between 1908 and 1911.

The Columbia River Packers' Association fished the location south of Sand Island in front of Sites 2 and 3 during the year 1911. I was around there considerable time. I saw them taking fish from there in large quantities.

(Testimony of Ralph Grable.)

Q. Have you in your experience as a fisherman known of the leasing of fishing locations by the holder to any other person?

A. Yes, sir, I have had a lot of experience in that, both on Baker's Bay and in the Willapa Harbor district.

Q. Did you lease locations yourself?

A. I have, sir.

Q. For what kind of fishing? A. For salmon.

Q. I mean for what kind of gear.

A. For trap locations; I have never leased any seining grounds whatever.

Q. Have you ever leased any grounds to be used for set nets? A. No, sir.

Q. Have you known of others doing it?

A. Yes, sir.

Q. Are you familiar with the custom among fishermen on the Columbia River as to the price that shall be paid for the leasing of fishing locations?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial, and not the proper measure of damages.

A. I think I am, sir.

Q. Will you state what that rule is?

A. Yes, sir.

Q. What is it?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial, not within the issues—not the measure of damages. [437]

A. I think that any man that leases ground from another or the man that furnishes gear for another

(Testimony of Ralph Grable.)

man to fish with is the same as ground; we consider it that way. The man who furnishes ground without gear, he is entitled to 33⅓ per cent.

Q. Of what?

A. Of the gross catch, and the man that furnishes the gear and grounds both, he gets 50 per cent; that has always been my way of leasing.

Q. You mean he that takes one-third of the catch—

A. And furnish his own gear.

Q. He takes the equivalent of the value—

Mr. FULTON.—I object to that as leading and suggestive; the witness has not so testified.

Mr. HADLEY,—That is leading, I will admit

Q. What do you mean when you say, Mr. Grable, that the lessee of a location pays one-third of the catch if he furnishes his own gear?

A. Furnishes his own gear.

Q. What do you mean when you say he pays one-third of the catch?

A. Means one-third of all the fish he catches. He furnishes the gear and they furnish the ground. That is what I mean.

Q. If the gear is furnished by the lessor, he then pays how much of the catch? A. Fifty per cent.

Q. Do you know how many fish were caught at that location last year by those who operated it, south of Sand Island?

Mr. FULTON.—That is, of your own knowledge.

A. I don't know that; I only know what I saw; that is all I can swear to, and I was on Sand Island

(Testimony of Ralph Grable.)

during this big run of fish while they were delivering the fish.

Mr. HADLEY.—Q. You say you were told how much the catch was? A. Yes, sir. [438]

Q. Were you told by an officer of the Columbia River Packers' Association? A. No, sir.

Mr. FULTON.—That is a conclusion.

Mr. HADLEY.—Q. Assuming *if* it to be a fact that the catch aggregated 360 tons of fish, what would be the rental value of those locations for the year 1911?

Mr. FULTON.—We object to that as incompetent, irrelevant and immaterial.

A. Under the rules that has been set forth altogether ever since we have been on the Columbia River for 23 years—we have been there fishing on all sides of the river—it has never been less than one-third of the gross catch for the man that furnished the outfit.

Q. Assuming that the catch was the amount I have stated, then what would you say was the rental value?

Mr. FULTON.—I object to that.

A. Thirty-three and a third would be the rental.

Mr. HADLEY.—Q. Thirty-three and a third per cent of the amount?

A. Of the gross catch, if it was one or ten.

Q. You mean if there were 360 tons—if there was that many caught? A. Yes, one ton or ten tons.

(Witness continuing:)

I know the market value of fish caught during the year 1911. I was fishing the whole season from

(Testimony of Ralph Grable.)

the first day. The market price for salmon last season (1911), small ones up to 25 pounds, up to the 15th day of August, six cents, and for salmon weighing over 25 pounds, seven cents and a half. That is what my statement shows for the fish I caught.

Q. Were you familiar with the fishing at that location, or with conditions as they existed during the year 1910? [439]

A. I hope to be, not being a seiner at that time, I was a gill netter, and used to fish on these grounds. Not being a speed fisherman, or what we call a "hard case," I generally aim to get low water near these seining grounds.

Q. What would you say was the rental value of this location during the season of 1910?

A. I would say they were within—

Mr. FULTON.—I object to that as incompetent.

A. (Continuing.) Within 20% in 1910 of what they was in 1911.

Mr. HADLEY.—Q. Then, what was the value during 1909?

A. Well, I was fishing there, also, and it would probably vary five per cent in that season, according to my fish receipts.

Q. Vary five per cent from what, do you mean?

A. From 1909 to 1910; 1910 was five per cent better.

Mr. FULTON.—Better than in 1909? A. 1909.

Mr. HADLEY.—Q. What about the value of the location during the year 1908?

(Testimony of Ralph Grable.)

A. I would say 1908 was five per cent better than 1909.

Q. Is it practical to operate set nets at the location south of Sites 2 and 3?

A. Why, it certainly is practicable.

Q. Are those locations valuable for set nets?

A. I only wish I had the opportunity.

The Columbia River Packers' Association, in making its catch in 1911 employed seines which were usually called "drag seines"—they also call them "beach seines"—it is one and the same thing, commonly called a drag seine. A drag seine is a net that is made of twine and cotton line, lead and corks, any length *of* depth that a man has a mind to make it, to fit his ground; he makes the seine to fit his ground, if it is a foot deep where he starts to 20 feet where he ends. He is supposed to [440] have one-third more web than he has water, and he lets the seine out according to his ingenuity, to his scientific line of fishing. They have different modes of fishing, one lays it one way and one lays another. You lay those out in particular according to the tides, and the man that lays the seine out the best is the man that is going to catch the most fish. When the seine is filled with fish, it is dragged to the beach into shallow water by horses and men on the last end of the seine, the men handle it and the horses are taken off; and the men get on the lead line and ride the lead line and haul it by hand, and another man he will do the cork line. You land the fish in the water, not on the land; the fish are in the water.

(Testimony of Ralph Grable.)

You can take these fish from the seine out of the water into a boat just as well as you can from the seine on to the land. It does not necessarily have to have 500 feet of bluff or anything like that to land these fish in. The fish are dragged into the shallow water. In operating a set net, you take the fish out this way: you simply have your set net and when the slack water—when the water is slack, in having the net tied, when the current is running over the net it is going to be all the same as in line. The greater the current is on it the more it is going to be tight. If you have it where you can set net it will do fishing in any kind of water. It is a proven thing—set net any day will do fishing in any kind of gear you can put there; you do not need to go on dry land to fish it, fish do not swim on dry land. A set net sets in the water. You have a set net in the water where the fish get at it and they are going to get in there and you do not go in the water to take them out. They are caught in their gills by the net by their own power driven into it. To take them out, you simply lift up the net and take the fish out; slip it off their head, put them in the boat and make away, and that settles it. The net is still fishing all stages of the time; it is the most perfect way of catching fish known on the Columbia [441] River in all stages of the tide.

Q. Having knowledge of the drag net operations conducted there last year, how many fish would you say the set nets that could be operated in that location (referring to Sites 2 and 3) would catch as com-

(Testimony of Ralph Grable.)
pared with the number caught by the drag net?

To this question, counsel for the plaintiff objected on the ground that it was incompetent and immaterial, and not the proper measure of damages.

A. Well, I should say that if a man could fish with set nets, there on that ground, with the amount —to take the same amount of gearing and put into set nets and put it on to that ground where these drag seines were, that the set nets would catch anyway within seventy per cent of the drag seines. The same amount of gear in length, you take five or six seines 350 fathoms long made up into set nets 20 to 50 fathoms long and set them on that ground, and if I run them myself, I could make more clear money than I could with drag seines.

In estimating the value of these locations for the year 1911, I would say that it was seventy per cent of the value of the location for a drag seine. That would be my estimation of the business. To take the same amount of gear, the same amount of gear that there is in the drag seine, and put it into set nets, and put on these same grounds, it would catch anyway seventy per cent of what the drag seines would catch. If you start from the first of the season, it would be when the water is muddy. The gill nets would catch within thirty per cent of the fish the seines would catch.

I was there during the year 1908 and the years following. I saw on these set net locations the set nets of the defendants in this case. They were in position for operation. They were in fine condition

(Testimony of Ralph Grable.)

when I saw them. I do not know what became of them. I just happened to be fishing there, gill netting; I didn't pay any attention, well, it was none of my business, in fact. I do not [442] know when they were taken out, and I do not know anything about that personally, only I know I saw the nets there on the ground while I was gill netting. I did not see Mr. McGowan there, or the defendants there operating the nets. They were there—the nets were there—and it did not seem to me anybody was bothering them, because fishing where those nets were, if anybody would make around with drift in there, they are going to lose their nets on the "Republic"—that is the old wreck, you know that. Anybody who makes around that drift in flood or ebb tide, he is going to lose his net. I know nothing of any interference in the operation of such set nets. This is practically a fishing ground for everybody, that is conceded, but there were no other set nets around there, and there were no other drag seines, excepting those of the Columbia River Packers' Association. There was no corking of that location during any of those years, by the operators of set nets, or any other fishing devices, to my knowledge.

Q. How do you fix the market value of those fishing locations?

A. How do I fix the market value of them?

Q. Yes.

A. Why, we always consider that any trap location or anything like that should be worth what it would catch in two seasons, that is allowing the man

(Testimony of Ralph Grable.)

to have one season to pay for his gear, and one to pay for his work; that is the way we figure it.

Mr. WELSH.—Q. By "we" you mean fishermen?

A. Yes, sir.

There is no comparison in value between the location south of Sand Island and locations in other parts of the Columbia River. That location south of Sand Island is so much superior there is no comparison. The fish run abundantly there. They certainly run abundantly there, or one would not catch 35 tons in one day. I have seen that done by the Columbia River Packers with drag seines. I do not know the date, but I was right there and saw it done. That [443] was in 1911. I remember that it was last year, in the month of August, I remember that, just the date I don't exactly remember. I was there on other days during the year 1911, and I saw the Columbia River Packers catching fish there, but I don't remember exactly the amount, from 24 to 25 tons per day. I was there at different days, but I don't remember how many fish they caught. I was there quite frequently, and they were catching fish every day I was there, and I saw the fish, and if I am not mistaken, I have Mr. Hawkins' word for it that they had 38 tons that day. Mr. Hawkins is one of the officers of the Columbia River Packers' Association. He is manager for that association in Ilwaco, and is manager of the Columbia River Packers' Association's seines on Sand Island, and had charge of them there. I have heard him say at different times how many fish

(Testimony of Ralph Grable.)

they caught there. I refer to the catch of 1911. I have been there most every season two or three days at a time when the big run of fish comes. We go when the fish comes in; we know when they are there just as well as the seiners. I have made estimates of the comparison between the two seasons.

Cross-examination.

(Interrogated by Mr. G. C. FULTON.)

I am working for myself and own my own gear, and deliver fish to P. J. McGowan and Sons. The manager of that company is H. S. McGowan.

Q. Now, over in Washington there is a law providing for the protection of fish-trap locations, isn't there? If a man establishes a fish-trap location, the law says no one can come within a certain distance of him; if he complies with that law he is protected so long as there is a lateral passageway of 900 feet on each side? A. Yes, sir. [444]

Q. End passageway of 30 feet, I believe; that in that distance no one can operate any kind of structture for the purpose of catching fish? A. Yes, sir.

Q. And there is no cash ever paid for the rental of ground, as I understand you to say, or rate of rental on these locations?

A. The man that takes the license, he is the man that owns the location.

Q. You say that the general custom is a certain per cent is charged; you had reference when you made those observations, in regard to the percentage to trap locations, did you not?

A. Any fishing ground.

(Testimony of Ralph Grable.)

Q. You had reference to set nets?

A. I have never rented any seining grounds; it is simply for set nets ground, or anything like that.

Q. We will get at that. Who did you ever know on the Columbia River to rent a set net location?

A. Well, I have known fellows, but I cannot bring them into court to-day.

Q. I do not want them here, I want their names.

A. Their names is Frank Shipley.

Q. Who is Frank Shipley?

A. He is in South Bend, Washington.

Q. Where was this set net? A. At Oregon City.

Q. At Oregon City? A. Yes, sir.

Q. I should have confined my remarks—I intended to confine them to the lower Columbia River. Name one man on the lower Columbia River that you know of renting grounds for set nets purposes during all the time you have lived down there?

A. (Witness hesitates.) [445]

Q. As a matter of fact, there has not been a set net operated on the lower Columbia River in the last 20 years. On the Columbia River proper.

A. There is any amount of them there at the present time.

Q. On the Columbia River?

A. Any amount of them operated all during the winter months, during the fishing season.

Q. Aren't they in the sloughs and rivers?

A. In the Chinook River, in the bay.

Q. In the Chinook River?

(Testimony of Ralph Grable.)

A. What they call Chinook is in front of Chinook town.

Q. During the fishing season, I am talking about.

A. That is the fishing season, when you can fish.

Q. That is what you understand as the fishing season?

A. When you can fish it is the fishing season.

Q. You understand that? A. Yes, sir.

Q. During the entire fishing season are those set nets operated?

A. During the entire winter fishing season; there are different fishing seasons.

Q. The canneries don't run.

A. The canneries don't, but the fishers do; this is a fishing season.

Q. During the run of fish, we will say during the spring fishing season on the Columbia River, are the only times that the canneries run—is the big fishing season? A. From May to September.

Q. From May to September? A. Yes, sir.

Q. That is the big fishing season? A. Yes, sir.

Q. During that time are any of these nets operated? [446] A. Beg your pardon?

Q. During that time are any of these set nets operated on the Columbia River?

A. Why, there are certainly plenty of them when you get above Meglers—

Q. I am talking about the lower Columbia River, below Meglers. A. Below Meglers?

Q. Yes.

A. I have never made a practice, but I have fished

(Testimony of Ralph Grable.)

with set nets there myself; but, under the circumstances, I, when I fished it, was not on rented ground. We fished with our set nets on ground already licensed for traps; we put set nets on that. When the boys went to put their traps in we took the set nets off, never thinking of making a permanent business of set netting on this ground.

Q. Why not?

A. Because the trap could catch more than the set net on the same ground.

Q. The trap could catch more than the set net?

A. On the same ground in clear water, but a set net would catch more than a trap on the same ground in muddy water.

Q. It won't do it down on the lower Columbia River? A. In muddy water it will.

Q. It won't do it in the season?

A. It won't during the season.

Q. Name one man operating set nets during the entire season on the lower Columbia River.

A. You mean beyow Megler's?

Q. Yes, sure.

(Witness hesitates.)

Q. I have been waiting for you for about five minutes.

A. At the present time I cannot recall anyone. I will tell you [447] I don't know anyone fishing with set nets.

Q. Only do it incidentally?

A. Yes, sir.

(Testimony of Ralph Grable.)

Q. Just a little play fishing? A. Perhaps.

(Witness continuing:)

I never heard of anyone operating a set net in the waters surrounding Sand Island, excepting P. J. McGowan and Sons, and these were the ones that I saw there, as I have testified. I saw these were in fine shape. I saw two set nets myself. I did not molest these set nets to see whether or not there were any fish in them or not. If Mr. McGowan testified he never caught any fish there, in my estimation, somebody had been in his nets. I stated that if a gill net got into the current and ran down on top of the "Republic" wreck, the net would simply be lost. He would lose his net on the wreck. The tide would take him down there. There is certainly a tide at certain stages of the tide. I should judge its speed to be about six miles an hour. That is a pretty swift tide. That is the ebb tide. I do not think the flood tide exceeds three miles per hour. Fishermen can come up on the flood tide and they lose their nets right there. A year ago, I saw fourteen or fifteen nets hung there on flood tide. It is not the severeness of the tide—it is the way the tide sets. The tide practically sets and drifts on the "Republic"—flood and ebb tide and it will go to it. The "Republic" wreck is between Sites 1 and 2 of the seining grounds. The gill nets drift down close to the island and then they have to take up. That is a pretty swift current there. If I were to fish set nets, I would fish them as near the island as possible in order to get out of the current where there is plenty of current a little closer. I would go not

closer to a fathom of water at low tide and from that to three fathoms. [448] There is plenty of eddy there. It is certainly an eddy along the island. The eddy goes out as near as I can remember for 200 fathoms. They do not have to be put in close. That certainly would be fishing at the time this current is at six or seven miles an hour. It would not take the fish out of them, that is, the current would not. That is, if you know how to set nets. The nets would not be set across the current, always place the set nets with the current, up and down with the current. I have seen them set that way right here on the Willapa River. If you set nets on the Willapa River as long as I have, for the last five or six years, you will never set a net across the current to catch fish. I have set nets on Baker's Bay, in the Columbia River, just to get some to eat. We never made it a business. I never said that the set net was the most perfect way of catching fish on the Columbia River. I never said anything of the kind. That I swear to positively. If I did make such a statement, I was very badly mistaken.

Q. Now supposing, that under the laws of Oregon, anyone could go in there and put set nets in front of Sand Island, anyone that wanted to—there is no lateral passageway at all—would it be of any value to any particular person for set nets there?

Mr. HADLEY.—We object to that as incompetent and immaterial, for the reason such a state of facts did not exist from the time of this injury.

Mr. FULTON.—That state of facts did absolutely

(Testimony of Ralph Grable.)

exist under the laws of the State of Washington, and I do not think Judge Hadley will deny it, he ought not, anyway, as a lawyer.

Mr. HADLEY.—Our objection is based on the ground there is no evidence here showing that there were such interfering locations made during the period for which we are ascertaining these damages. [449]

Mr. FULTON.—The Court takes judicial notice of the laws of the State of Oregon in this case.

Q. What is your answer?

A. I don't see but what one man would catch just as many fish as another; they come there so thick.

Q. If a man put his set net within 20 feet of yours he would catch just as many fish?

A. I can't see any difference; fish don't come one way, they come all directions.

Q. So that you think it would not make any difference if there were 1,000 set nets in front of Sand Island, Sites 2 and 3, one set net location would be just as good if there were none there?

A. I didn't say that; this is what I say: If the nets that are put in, what we term a fair show, one net will be as good as another; one net will do just as good as another one day with another.

Q. That was not my question. You have no right to assume that. My question was this: Assuming that it is the law in Oregon that one set net locator is not bound to respect another, and that after you have established a set net location under the laws of Oregon—we will assume that to be the case—another man

can come along and plant one in front of you?

A. I consider one just as good as the other.

Q. The question I asked you is this, would then a set net location be of any value in front of Sand Island under those conditions?

A. It certainly would.

Q. Well, we are coming around to the main proposition; one set net location in front of Sand Island is worth just as much as if it were alone, as if there were a thousand set nets within the immediate vicinity, within ten or twenty feet of it?

A. I don't see any difference. **[450]**

Q. You swear to that? A. Yes, sir.

Q. How in the name of God could fish get there if they were absolutely surrounded by set nets?

A. You have never fished with gill nets?

Q. I will go on the stand later on, and you may cross-examine me. How would fish get there if set nets are entirely surrounded with other set nets?

A. That is just as easy for the fish as it is for me to answer the question.

Q. He has got his eyes on the set net and he will come there?

A. You would not think a man out there would get fish, but he would get as many as the man on the other side of him.

Q. Don't you know there are more rows on the Columbia River because one gill netter puts his nets down in front of the other fellow, within 50 or 60 feet of him? A. They don't pay any attention to that.

Q. There is no such a thing as corking?

(Testimony of Ralph Grable.)

A. No, sir, we have overcome that.

Q. In seining,—seining would be the same thing?

A. Yes, what is the difference?

Q. Then the operator on the lower seining ground would not interfere with the upper one at all?

A. I don't believe that.

Q. A man seining in front of Site No. 1 on Sand Island would not interfere with Site No. 2?

A. No, sir, Site No. 2 will catch more than Site No. 1.

Q. You swear to that? A. Yes, sir.

Q. Don't you know that the number of years they have operated there has been more fish caught on Site No. 1 than 2 and 3 together?

A. I know better than that. [451]

Q. You swear to that? A. Yes, sir.

Q. You swear positively to that? A. Yes, sir.

Q. Now, just tell us how you know.

A. Simply because what they call Site No. 1 is part of Site No. 2; that is the whole reason of it. Where they catch the fish is practically on Site No. 2, but they land them on Site No. 1; for those catching fish on Site No. 1, that I don't know anything about.

Q. That is your reason? A. Yes, sir.

Q. The Columbia River Packers' Association did not own Site No. 2 until the year 1912—Site No. 1, until 1912? A. Why did they fish there?

Q. They never fished Site No. 1.

A. That is a funny thing, what were they doing with boats and nets?

Q. They were landing on Site No. 1 during the

(Testimony of Ralph Grable.)

years you are talking about? A. Yes, sir.

Q. You are just as sure of that as anything you are talking about?

A. I am. I was right there and know the business. I seen it sink down and they could not get it to shore; what do you call it?

Q. Henderson and Olson rented that ground?

A. Yes, sir. What was the Columbia River Packers' seines on that ground for?

Q. They fished it then?

A. They fish it, they certainly do.

Q. Clear down on the other fellow's ground.

A. Yes, sir, certainly; they were down on Henderson's and Olson's ground. [452]

Q. All the time?

A. No, sir. When they came down they tried to fish it there.

Q. That is your testimony? A. Yes, sir.

Q. Now, you never have during all the time you have fished on the Columbia River operated a set net on the lower Columbia River during any full fishing season? A. Never have.

Q. You have always worked for somebody else on a trap? A. No, sir.

Q. Never owned a trap of your own?

A. No, sir.

Q. Then, all the trap-fishing you ever did was under the employ of someone else?

A. With my father, on a rented location.

Q. And the rest of the time you have been gill netting?

(Testimony of Ralph Grable.)

A. And purse seining and drag seining.

Q. Where did you drag seine?

A. On Sand Island, on what you call ground No. 2.

Q. Why didn't you set net it then?

A. Why, that was not—I didn't own the ground, I was simply working there.

Q. Who were you working for?

A. W. C. Brumbach.

Q. You were his foreman?

A. No, sir, I was one of his crew.

Q. You did not suggest to him that it would be cheaper to operate a set net?

A. No, sir, none of my business.

Q. You never did operate a set net there, nor anybody you heard of outside of McGowan?

A. No, sir, not that I heard of. [453]

Q. Who else did you work for on Sand Island?

A. I fished that one season.

Q. For Brumbach? A. Yes, sir.

Q. That is the only time? A. Yes, sir.

Q. That is the only time you ever worked on Sand Island?

A. That is the only time I ever worked on Sand Island, yes, sir.

Q. You have been gill netting ever since?

A. Yes, sir, and purse seining.

Q. Where did you purse seine?

A. Right near those grounds.

Q. When? A. In 1906.

Q. You were working for those purse seiners?

A. I happened to be one of the owners of the rig

(Testimony of Ralph Grable.)

myself. We fished there three seasons along the land, from 1906, 1907 and 1908.

Q. How far out can you run a set net there in front of Sites 1, 2 and 3?

A. You are off your base there.

Q. How far out can you run a set net?

A. How far out can you run a set net?

A. Yes. You would not run it out at all?

A. I did not run any set nets out at all; I run out parallel with the current.

Q. The current you say is very swift there?

A. Yes, sir.

Q. You never tried it out there?

A. I will show you a theory. You take a gill net and drop it out on this seining ground, parallel with the current; it is the best way to catch fish. [454]

Q. Your set net is never out straight, it is always crooked?

A. That don't make any difference. It is supposed to hang with the current; if you hang the net itself it will hang with the current.

Q. That is the theory upon which you figure a set net will work? A. Yes, sir.

(Witness continuing:)

I have tried set netting, operating the net up and down stream in the Nasel River, where the current is just as swift as that in the Columbia River. It is not true that the only place where set nets are operated on the Willapa Harbor is an eddy. I set it out right in the straight current.

Q. Now, if this set net right was of such value why

(Testimony of Ralph Grable.)

haven't you put a set net in there?

A. That has never been—it is not in conjunction with my business.

Q. It is not your business? A. No, sir.

Q. How many fish does the gill netter ordinarily catch each season?

A. I should judge in the last—I only *just* myself as a common fisherman—they should catch—they should average ten ton to a boat.

Q. Ten ton for one entire season? A. Yes, sir.

Q. You testified a while ago that you saw them catch with seines on Sand Island, in one day, 35 tons, and that you could use the same set of material in set nets, and you could catch within 30% of 35 tons in one day, which would be about 25 tons.

A. I only gave you that as my supposition.

Q. Are you willing to tell me now, Mr. Grable, that you would [455] overlook a proposition like that where you could catch in one day with the same equipment you ordinarily use in employing a gill net, three times as much as you could catch in a whole season, therefore you would not take advantage of it?

A. You see, a man is never—I am never around looking for trouble or animosity with anybody. I want to go where I am perfectly free from all complaints of anybody. I don't want to go in there and put in set nets or anything to have any lawsuits or trouble with anybody.

Q. Why should you think you would have a lawsuit?

A. Well, because these big companies sees a man

(Testimony of Ralph Grable.)

making a few dollars, then they try to get him out.

Q. Do they bother you about gill netting; you are making money gill netting? A. Yes, sir.

Q. Do the big companies bother you there?

A. No, not particularly.

Q. Why do you think they would bother you by putting set nets in front of Sand Island?

A. Never wanted to put any there.

Q. Didn't care to make 25 tons of fish a day?

A. Because it was not—that was not my line of business at all.

Q. You do not know much about set netting?

A. Yes, I know all about set nets.

Q. I cannot understand why a golden opportunity like that should be permitted to slip away.

A. Because it was taken ahead of me.

Q. Who took it from you?

A. Why, this P. J. McGowan had the seining ground there; that ground in the first place belonged to them, and we acknowledged rights, the same as we had with traps on any other ground. We acknowledged their rights, that is their ground. A man stakes off a location, that is his ground—a man takes up [456] the seining ground—that is his ground.

Q. That is the reason you did not go there was because McGowan had it?

A. Didn't make any difference whether it was McGowan's, or whose it was, so long as they were the first persons there; it don't make any difference as to whether it is McGowan's, or the Columbia

(Testimony of Ralph Grable.)

River Packers' Association's, if they were the first people there we acknowledge their right, same as a man taking up a homestead or anything else.

Q. That was the theory of it? A. Yes, sir.

Q. That is the reason why you did not put in the set nets? A. It certainly is.

Q. That was the only reason?

A. I don't know of any other.

(Witness continuing:)

They do not fish drag seines during the muddy water, or when the water is muddy. There is no question about that. They might try it, but they don't catch any fish. I noticed how Mr. McGowan had his set net locations; they were right across the current. I suppose they catch fish that way as well as any other way—not so well, but you can catch a fish on slack water. The current would not carry them out. If a man knows how to set a net, the current would not carry the fish out. He would take the fish out during slack water—within a hour of slack water is when the fishing is best. If he did not take the fish out in slack water, perhaps some of them would be gone. These set nets were placed practically in the gill netter's drift. It is a fact that the Columbia River Packers' Association frequently have to wait for gill netters to pass by in front of their grounds before putting out their net. This has occurred very frequently during the last three years. These gill nets come close to the [457] shore—they certainly do.

Q. I thought you said they could not get in on ac-

(Testimony of Ralph Grable.)
count of the wreck?

A. They know danger when they see it. Don't you know enough to jump a ditch when you come to it? They know enough to pick up the nets. When you come to the wreck you lose the nets.

Q. But they go by this ground occupied by Mr. McGowan's set nets, if he operated the way he started in to, and would be right on the main gill net drift? A. Not necessarily.

Q. I thought you said a while ago—

A. You tried to make me out a liar.

Q. No, sir, I would not insinuate that. I want to treat you perfectly, as a gentleman; I claim to be a gentleman myself; but I misunderstood you. I understood you to say the set nets he had were right in the main gill net drift.

A. I said that the gill nets drift there.

Q. Now, Mr. Grable, didn't I tell you that when the Columbia River Packers' Association was operating their seines there they had to wait many, many times during the last three years on account of the fact that the gill netters were right in close there to the shore, and they drifted down there habitually, isn't that true? A. Yes, sir, certainly is.

Q. That is the best drift on the Columbia River for gill netters, that is, in front of Sand Island, in front of the seining grounds, and you know it. Now, tell the truth about it, you know it is true?

A. No, the most of them, perhaps a few gill netters would drift on the seine current, but the main

(Testimony of Ralph Grable.)

gill net fishing is outside of the "Republic" wreck. [458]

Q. Isn't that the principal gill net drift down in front of this particular island, in front of these sites? A. Why, you might say that—

Q. Answer the question.

A. It is not in very near the vicinity of Sand Island, the main gill net drift is not there. It was in the length of a seine outside of Sand Island where the main gill net drift is, that is, I should judge. There is a few gill nets come in, they come scattering everywhere, but the main gill net drift is more than a seine length outside of Sand Island.

Q. Then the Columbia River Packers' Association is not bothered with gill nets at all?

A. You *take* a certain extent know nothing about it to amount to anything.

Q. Nor so much as they were a little while ago. A little while ago they were bothering seriously, but not as much now as they were then?

A. They are obliged occasionally to wait for gill netters to drift out of the road, a minute or two. I said it was not on the main drift.

Q. Didn't you also say that the gill netters had to wait for the Columbia River Packers' seines to get out of the way? A. Certainly.

Q. You say as a fisherman—

A. I say that is not the main gill net drift, on those seining grounds.

Q. In front of these Sites 2 and 3, particularly, is the main gill net drift on the Columbia River—the

(Testimony of Ralph Grable.)

best on the Columbia River?

A. What do you mean?

Q. I mean—

A. On the same ground where the same— [459]

Q. I mean, they start their gill nets up above, a great distance up, and they drift down, as you said awhile ago. The current sets in there, as you said awhile ago it did, and you cannot go back on that.

A. It will go the length of a seine outside.

Q. You testified awhile ago that this current—the main drift of the current—was right up against the island from this "Republic" wreck. It is a fact that gill netters put their gill nets in the water above and the current drifts them down and they sweep the shore of Sand Island on the south and come down there by the hundreds.

A. They don't come down by Sand Island unless they lay out from Sand Island. They have to lay out from Sand Island to make the long sweep of Sand Island; and the main layout on that drift—that is, from Pt. Ellice down to the head of the island, and a net laying out there at Pt. Ellice, or from McGowan, or Ft. Columbia, or from the head of the island, where most people lay, will almost always drift outside of the "Republic." They might come within a few fathoms of the end of the "Republic," but any net will catch the "Republic," provided the tide takes you there, but not on this particular seining ground, they don't come there.

Q. That is the main drift down this channel of the river from Pt. Ellice? A. Yes, sir.

(Testimony of Ralph Grable.)

Q. You do not want to change the statement that the current drifts them in there?

A. They will draw towards the "Republic" wreck.

Q. That is down along the beach?

A. Here is the beach here, and the nets come from this direction; you call this the wreck, they will lay out their net here and it will draw them this way (indicating). **[460]**

Q. We cannot take that.

A. That is the proposition.

Q. Didn't you say awhile ago that if McGowan left his nets in there the gill netters would have to take up their gill nets or run over *then*?

A. Yes, I said that.

Q. What made you say that if it was not in the drift? I cannot understand you, you get me all confused.

A. I said he would have to take up his net or he would catch that set net.

Q. If it was not in the drift, why should he have to take up his gill net?

A. Has he any right to put it there?

Q. I would not argue with you, you beat me in the argument. I want to know why you made that statement, if your net don't drift down and these set nets were not in the road, what do you mean by saying that the gill nets would have to take up the gill nets, or they would snag them on the set nets. What did you mean by that statement?

A. I simply meant this, that if a man seen an ob-

(Testimony of Ralph Grable.)

struction in his road, if he is drifting, he is going to pick up for it.

Q. You tried to give us the information that it is not in his road. If it was not in his road, why in the world did you make that statement, and lead me to believe that it was? A. (Witness hesitates.)

Q. You do not care to answer that. I will not insist on it. That is all.

(Last few questions and answers read by the stenographer at the request of Mr Welsh.)

Mr. WELSH.—Counsel asks about 15 questions at the same time and the witness cannot tell which one to answer. We insist he should indicate which question he wishes the witness to answer. **[461]**

The WITNESS.—He has asked me that 1000 times.

(Last question read as follows:) "You offered to give us the information that it is not in his road. If it was not in his road why in the world did you make that statement, and lead me to believe it was?"

A. What was in his road?

Mr. WELSH.—The fish nets, he means. He wants to know if they were in the road.

Mr. FULTON.—I object to this, counsel cannot cross-examine his own witness.

A. If the State gives a man the right to set—have a set net ground on these grounds, anybody coming in there drifting has to pick up his nets for these nets, hasn't he?

Q. That is the question I asked you.

Mr. FULTON.—That is practically the question I

(Testimony of Ralph Grable.)

asked you. That is just exactly the proposition. I don't think you have a right to read my mind and interpret my question.

Redirect Examination.

(Interrogated by Mr. WELSH.)

I say there is an eddy close to Sand Island on the south. I should judge it to be a good place for set nets. I say this eddy extends out for a distance of 200 fathoms, it varies in different stages of the tide; it works in and out. The main drift channel and course used by fishermen with drift nets is out in the river to the south of these set net locations, and to the south of the "Republic" wreck. I should judge the main gill net drift is 250 fathoms from the dry land in all stages of the tide, while the set nets of the defendants, as near as I can remember, extended out between 60 and 100 fathoms. I didn't pay strict attention; I know this was about their length. They did not extend out of the main drift channel of the gill netters.

Q. If that is true, then would it necessarily interfere with **[462]** gill net fishing on the Columbia River?

A. Not with the majority, perhaps a few could go in there and say that this encountered them, you see, You might go in there with your nets and lay out where the set nets are, but the main drift is outside of the "Republic," which I saw the nets were inside of the end of the "Republic."

Q. Mr. Fulton asked you to name one man that operated a set net the entire season. Now, I will ask

(Testimony of Ralph Grable.)
you to name one man who operated a fish trap the entire season.

A. Why, I don't know that I could. You mean in the Columbia River?

Q. Columbia River.

A. On the Oregon side—Sand Island. There is the Markham brothers—D. & D. Markham. I can name a man who operated a drift net during the entire season. I don't know of any person operating a drag seine from the beginning of the season to the end of the season. The reason for that is that conditions are favorable during certain portions of the season, and I could not name a single individual or corporation on the Columbia River that operates a drag seine during the entire fishing season.

(Interrogated by Mr. HADLEY.)

Fish traps and seines and gill nets, you must remember, are altogether different kinds of fish gear. It is acceded that the gill nets of the Columbia River catch 80% of the fish caught on the river. There is certainly fine fishing grounds on the south of Sand Island for any kind of gear. Outside of Sand Island, on the lower Columbia River, there are many valuable fishing locations occupied by traps, there is no room for set nets, that is, on the most favorable locations, if the law allows you to fish the ground—the ground is there providing you have the right to fish it. That part of the law I don't know anything about. These locations south of Sand Island are among the most valuable. **[463]** The fish run into set nets with both tides. The salmon go in all direc-

(Testimony of Ralph Grable.)

tions, in shore and off shore, and with the tide and against the tide.

Q. If a set net is located in one place and another is located near it, on one side of it, the fish will run into the inner net from all directions as well as from the direction towards the other net?

A. I do not see any difference which side the net is on, whether on the right hand or on the left hand. There is a difference in the time of the year. In the first of the year, you will catch more fish on the ebb tide than you will on the flood tide, and the last part of the season you will catch more on the ebb than you do on the flood.

Q. You stated to Mr. Fulton your view that one set net location or set net would catch as much as another. I would like to have you explain what you mean by that, I don't know that I fully understand you.

A. One set net will catch as much as another. I will explain it in this way, that if you set four nets in a line, either upstream or downstream, if the salmon go this way, why don't as many salmon go between these two nets as will between the next two?

Q. How do the fish go up the river, in a line like geese, or do they spread out and cover the river generally?

A. When salmon strike the shallow water they spread, either ebb or flood tide, and when they strike the holes there is where they congregate; and the next change of the tide, whether half or full tide,

(Testimony of Ralph Grable.)

high water they spread to one hole and another, and begin coming in a bunch to the next hole. You can watch them from North Head to Pt. Ellice. The fish act just exactly the same in all these holes.

Q. How is it at the Sand Island location, do they spread out over the river generally? [464]

A. I think the salmon come from the hole, what they call the Black Tank Hole, to the "Republic" hole, and the next start they make is on the Sand Island sand, and the next time they leave there you don't know where they go, but the first thing you know they are at the Desdemona Sands. There is the next place you find the salmon; nobody knows where they have gone to, but the next place, why, they are right there.

Q. Are they scattered over this territory covered by these locations of the defendants?

A. They certainly are, when they go over that ground, when the seine is dragged over the ground, they catch the fish.

Q. Then it does follow that for that reason one set net will catch as many fish as another?

A. I think so.

Q. One will not be in the track of the fish?

A. One will not be in the track of the fish any more than the other.

Q. I understood you to say to Mr. Fulton that one set net, in your opinion, should catch as much as ten tons of fish per season. Did you have reference to the particular location there at Sand Island, or were you speaking generally on an average for the

(Testimony of Ralph Grable.)

lower river? A. I said a gill net, not a set net.

Q. I misunderstood you. What is the fact, Mr. Grable, as to other fishermen, whether gill netters or drag seiners, or those who fish with any appliance, respecting the location of set net fishermen?

A. Why, they respect the distances; they give what you call each man a show.

Q. By that you mean a sufficient distance for the clear and free operations of his location?

A. Of his gear and location.

Q. So as not to interfere with each other? [465]

A. So as not to interfere with each other.

Q. If the gill nets should drift down over these grounds, what is the custom as to the gill netters if there were set nets upon these grounds; would they drift down on them, or not?

A. They would clear or take up their net before they got there. That is what I would do.

Q. If the set netter has a right to be there, gill netters would respect that right and keep out of the road?

A. Yes, the gill netters is right to respect his right.

Recross-examination.

(By Mr. FULTON.)

Q. That is, if the gill netter thought he had a right to be there?

A. Any man is supposed to be a law abiding citizen.

Q. Yes, but don't you remember a few years ago when a gentleman built a trap south of Sand Island?

A. I was there.

(Testimony of Ralph Grable.)

Q. Were you among the gentlemen who pulled it out? A. I certainly was.

Q. The gentleman who built the trap on the south side of Sand Island had a license, didn't he?

A. We didn't pay any attention to that; he was on our ground.

Q. He was interfering with the main drift currents of your gill nets, wasn't he?

A. Not so much with gill nets as he was with the traps.

Q. Who? A. The man that drove the location.

Q. The trap-men didn't pull out this trap?

A. They certainly did not.

Q. Wasn't it the gill netters that did it?

A. Not on your tintype, the trap-men did. I was there, they done half and half.

Q. There was some gill netters mixed up in it?

[466]

A. Yes, there were some gill netters mixed in it.

Q. Why?

A. They thought it was interfering with their drift. They didn't catch fish enough on that ground that season, enough to pay for the hanging twine on their nets.

Q. What trap do you refer to being pulled out?

Mr. WELSH.—Objected to as immaterial.

A. I don't know—

Mr. FULTON.—Q. Who drove it, do you know?

A. I don't know who drove it; I know whose driver drove it.

Q. Whose driver?

(Testimony of Ralph Grable.)

Mr. WELSH.—I object to that as immaterial.

A. As if anything—

Mr. WELSH.—This is bringing into the case something not in issue at all, and for the purpose of driving a prejudice, and wholly and entirely immaterial, and besides beyond the issues.

Mr. FULTON.—Q. You know by general reputation who the owner of the trap was.

Mr. WELSH.—I object to that as immaterial, and for the same reason as the other objection.

A. I know that one of the men is dead now.

Q. Do you know by general reputation who the owner of the trap was? A. I do.

Q. Who?

A. I think there were three different parties concerned in the proposition.

Q. Name them.

A. Dan Linn and James Franey, that is the only two names I know.

Q. Where was this trap built?

A. There was never any trap built there, it was only the location.

Q. The pilings were driven—where?

A. In the west side of Sand Island. [467]

Q. I am talking about the one driven up on the south side of the island.

A. I don't know anything about that.

Q. You don't remember about that one?

A. No, sir, I don't remember about it.

Q. You do not remember about the gill netters going down there in a body and tearing out the trap

(Testimony of Ralph Grable.)

driven on the south shore?

A. I don't know anything about that; that was before my fishing in that vicinity.

Q. There was one driven there in the Oklahoma Channel?

A. There was no whole trap driven there.

Q. I am talking about the piling.

A. I told you Dan Linn and James Franey. The trappers pulled them out, and I happened to be one of the trappers that pulled them out.

Q. Because you thought it interfered with your rights? A. Yes, sir.

Q. You did not respect their rights?

A. We did not think they had no right.

Q. You respect a man's rights when you know absolutely he has rights? A. Certainly.

Q. But if he hasn't any rights, you do not respect them? You do not pay any attention to what the courts say, you go and do it?

A. Fishermen respect one another's rights; if he has rights they respect it, and if he has no rights they don't respect it.

Q. They are the judge of whether he has rights; they are the judge and jury?

A. They are generally right, aren't they?

Q. Now, I asked you the question direct about whether or not you knew any person operating a set net during the entire fishing season—you understand that I mean during that portion of the spring salmon fishing when they generally operate them—they [468] don't any begin so early?

(Testimony of Ralph Grable.)

A. I don't know when—

Q. You understand what I mean?

A. I cannot recall to memory anyone who makes a practice of set netting out of season.

Q. They generally operate simply during the winter months?

A. Yes, catch winter fish.

Redirect Examination.

(Interrogated by Mr. HADLEY.)

When the Court has determined the location to be a valid location and has held that the locator is entitled to occupy it, it is the custom of the fishermen not to interfere with the Court, that I know of, and without regard to the law, or what the Court may hold, the fishermen are in the habit of respecting each other's locations, and do not interfere with them. **[469]**

[Testimony of Moses Hirschy, for Defendants.]

MOSES HIRSCHY, a witness called on behalf of the defendants, after being first duly sworn, testified upon interrogatories propounded to him by counsel for the defendants as follows to, wit:

(Interrogated by Mr. WELSH.)

My name is Moses Hirschy and I reside at Chinook, Washington, and have lived there going on twelve years. I follow the occupation of fishing; I have been engaged in the fishing business since 1903, during which time I have fished in the waters of the Columbia River, and that is the only place I have ever fished. The gear that I have used during that

(Testimony of Moses Hirschy.)

time was seining and dragging. I am acquainted with the operations of the Columbia River Packers' Association south of Sand Island in front of locations two and three. I worked there four years, working for them during that time doing all kinds of work, also fishing. I was working for the Columbia River Packers' Association in its fishing operations during that time on the south side of Sand Island in front of locations two and three fishing for salmon fish. I started in working for them in 1903 and worked nine years altogether. I fished for the plaintiff in 1908, 1909 and 1910 and 1911; I think it was 1912, 1911, 1910 and 1909, and I am working for the plaintiff now. I am not working for the plaintiff just at the present time. I saw the set nets of the defendants in the waters of the Columbia River; that was in 1909; I was fishing for the Columbia River Packers' Association at the time.

Q. In 1911 do you know how many tons of salmon fish were caught by the plaintiff in the waters of the Columbia River on the south side of Sand Island in front of locations two and three? [470]

To this question counsel for plaintiff objected upon the ground that it was incompetent.

A. I could not tell just exactly how many tons in 1911, something like 150 tons.

Q. I thought you told me 360 tons?

A. This is this year, 1912; 1911 would be last year.

Q. That would be 360 tons you caught?

A. Yes, sir, last year, 1911, we caught 360 tons. I know this because I would inquire daily as to the

(Testimony of Moses Hirschy.)

catch and saw them weighed. I know that this location on the south side of Sand Island was a good fishing ground, by that I mean a good place to fish, for the reason that fish certainly run there at all tides in very large quantities. They claim it is the best ground on the Columbia River for salmon fishing; that is so far as I know. I have fished for nine years and I think I ought to know something about it. I never tried any other kind of gear than the drag seines, but there was a set net license over there but I never saw much gear on it to amount to anything. I saw a lot of short pieces of gear on it at one time; that was in 1908. They were taken up by the Columbia River Packers' Association. We had to clear the ground if we wanted to fish, we have got to get the ground cleared.

South of Sand Island there are eddies in the river. It forms an eddy there when there are strong tides. I never set nets any over there but it must be such a thing that it was a good place to put set nets by fishermen. I guess a man could make something fishing on good tides. My judgment is that it would be a good place for set nets, but I would not like to give my opinion about that because I never tried it. I do not know of any better fishing location on the Columbia River than in the waters south of Sand [471] Island, and I don't know of any other place where the fish ascend in greater quantities than at that place.

Q. What can you say with reference to whether or not a set net, if placed south of Sand Island, below

(Testimony of Moses Hirschy.)

the line of extreme low tide, say, in about one fathom of water, and the set net was never more than about 100 fathoms out, as to whether or not that set net would be in the channel or course of the Columbia River used by drift net fishermen?

A. I don't think it would be right in the channel, because the channel is quite a ways out. How long did you say the length was?

Q. One hundred fathoms, say; is it not a fact that the drift net fishermen go south of Sand Island a distance of more than 100 fathoms? A. Yes, sir.

Q. And that the usual course and the general course used by them is more than 100 fathoms south of Sand Island? A. Yes, sir.

Q. Do you know how the fish run in the Columbia River at that point in 1910 as compared with 1911?

A. It looks to me it is about the same.

Q. About the same. What can you say relative to 1909?

A. I don't think it was just quite as good in 1909 as it was in 1911, but they ride through always, get their catches; some years you get more fish and some years less fish.

Q. Well, what can you say about 1908?

A. Well, it depends a whole lot on the water, and on the freshet. That is about all I know about it.

(Witness continuing:)

In using a drag seine horses haul it ashore; the horse goes on the shore. Sometimes you are in the water and sometimes on the land. It is not necessary that you should go on [472] shore to land the

(Testimony of Moses Hirschy.)

seine, it could be landed in the water, and the horse will be in the water. If you want to land in the water the horses and everything would be in the water; the water would have to be shallow enough for that. It is a fact that drift nets come ashore there and they come right close to the shore; in fact hundreds of them come close to the shore in a day. If you put a set net in there it would catch these gill nets sometimes. The set nets placed by Mr. McGowan were from ten or twelve feet from the shore, although I could not say exactly; some of them you could reach with a team, and some of them you could not reach with a team. In some places the water was so deep you could not go out and get them. They were probably three to two fathoms from the shore, something like that. At high water they might be five or six hundred feet from the shore. These hundreds of gill netters that I spoke of as drifting close in to the shore, they would generally come down there and wait until the flood came and go up with the flood, drifting up, and go down with the flood. They strike the shore all of the time when it is good fishing. Some of them strike the shore, and some don't, of course. They come along there about half tide. It is a frequent occurrence, in fact a daily occurrence, during the height of the fishing season that in operating seines we have to wait until the gill nets get by.

These set net locations that Mr. McGowan placed there, it seemed the gill netters were afraid of them; they were there quite awhile. Some of them, I think, were taken out by the gill netters, maybe one or two.

(Testimony of Moses Hirschy.)

I saw some of them hung up on them. If these set nets were placed there the gill netters would not have to abandon the river altogether, but it would injure their drift some. I don't know very much about it; in fact I never took much interest in the gill netters—always had lots of other work. Most of the gill netters seem to keep outside of [473] *of* the "Republic" there. Inside of the "Republic there was not enough room for gill netters to drift so they kept out pretty well off the buoys. I don't know whether these buoys extended out over a mile from the "Republic"; I know the line of the current, but I could not say; it might be such a thing as a mile. The gill netters were there but I know nothing about the gill netting business. I seen them drift up and down there. The number that would drift up there I could not tell; they drift down and went down, that is all I would say. I would not say whether there were several hundred or not. I never counted them and I could not give you the exact number. The gill netters did not come in very close to shore because they would not drift in; it is a kind of an eddy and they did not like to come in; there is a kind of an eddy sometimes; that eddy shifts back and forth; it shifts as the tide shifts. I don't know how wide you call these eddies; you might call them ten feet, but I would call them, some of them 150 fathoms; I would call the eddies about that width; the bigger the tides, the bigger the eddies. At low tide from the edge of the shore line these eddies might be about 500 feet from shore. I would not swear to that, but as quick as the tide starts

(Testimony of Moses Hirschy.)

to flood it comes in close, something like a hundred feet. There is a kind of a cove in there and it seems that when the tide comes in, just as I told you awhile ago, it goes with the tide; maybe in half an hour there will be a strong eddy and all at once, no eddy at all, just quiet and a straight current. What I think about this eddy is, when the tide is running out, it starts at a point way down close to the "Republic," strikes that point and the water is away out, and the water running so strong it throws more water back, kind of throws the water back to the seine. After we lay out the seine, the seine runs just the other way. There isn't any swirl, it is just a [474] little quiet water; sometimes it is not very quiet; sometimes we don't have much eddy. If you set a net out there I don't think the tide would draw the fish out of it, I don't think the tide is that strong. I never operated a set net or a gill net; I don't know anything about them. I never set net in my life; all the fishing I have done I have seined. I know as far as seining on Sand Island is concerned it is valuable for seining purposes, but I do not know anything about set nets. I never saw Mr. McGowan take any fish out of his set nets.

Thereupon, plaintiff through its attorney moved the Court to strike out all the testimony of this witness pertaining to set nets upon the ground that the witness was incompetent. The counsel for the defendants objected to the allowance of said motion upon the ground that all the testimony brought out about set nets was brought out by counsel for plaintiff and

(Testimony of Moses Hirschy.)

the witness was not put upon the stand for that purpose.

Redirect Examination.

(Interrogated by Mr. WELSH.)

I do not pretend to know anything about running set nets. I do not know anything about the operation of set nets, but I saw the set nets of the defendants when located there. The inner line or buoy on these set nets was in, I should say, just about six fathoms of water.

Q. You mean to say the inner one was out in the water six times six, or thirty-six feet below extreme low tide?

A. There was deeper water, I won't go in there. Three times six is thirty-six.

Q. How long are these set nets? [475]

A. Our seines?

Q. The set nets of the defendants that you saw located there.

Q. Well, they were the regular—a piece of cable or a little piece of lead line.

Q. I asked you the length of them.

A. The length of the set nets?

Q. Yes, the length.

A. I never saw any *link*.

Q. You do not know how far they extended out into the water from the shore? A. No, I don't.

Q. You haven't any idea? Now, isn't it a fact that beyond them is the place where gill netters drift, and not inside? A. Yes, they reach mostly outside.

Q. Isn't the channel of the Columbia River mostly

(Testimony of Moses Hirschy.)

outside? A. Yes, sir.

Mr. FULTON.—That is leading and suggestive.

Mr. WELSH.—I think the Court would permit me to lead this witness.

Q. Where is the channel of the Columbia River, Mr. Hirschy, with reference to where the set nets of the defendants were located? A. The channel?

Q. Yes. A. The channel is quite a ways out.

Q. Out where? A. Out into the river.

Q. South of where they were? A. Yes, sir.

Q. South of the extreme end of it? A. Yes, sir.

Q. How far south of the extreme end of this set net? [476] A. How far is south?

Q. How many hundred feet south of it?

A. Well, sir, the channel is pretty well over.

Q. Isn't it a quarter of a mile?

A. It looks that way.

Q. Or more? A. Or more.

Q. Isn't it a fact that the gill netters very seldom, if ever, come into the place where set nets are located?

Mr. FULTON.—I object to counsel cross-examining his own witness; it is leading and suggestive.

A. Just as I said before; yes, they drift outside, most of them.

Q. (Last question read.) Do you understand the question?

A. Yes. Do I have to answer that question?

Q. Yes, they very seldom if ever come in?

A. Very seldom.

Q. How did you answer?

(Testimony of Moses Hirschy.)

A. I said very seldom, they come in.

Q. Very seldom they come in. Mr. Fulton would have you testify that they used to come in and get hung up on our buoys, is that a fact?

A. Well, of course, here and there one gets tangled up, what I saw.

Q. How often did you see it?

A. Not very often, because they don't come in there.

Q. Why don't they come in there?

A. It seems as though that eddy drives them out; such a thing must be.

Q. Now, in answer to counsel's question, he made you testify as though that eddy would disappear at times and there wasn't anything to it. Is that a fact, or is the eddy permanent there? [477]

A. You know how it is, it will be there for half an hour, and then kind of disappear—

Q. But at such stages—

Mr. FULTON.—Let him alone. Go on and explain.

A. The stronger the current the heavier the eddy, and the less the current the less the eddy.

Mr. WELSH.—Q. But that is true every day?

A. Yes, sir.

Q. It doesn't disappear to-day and come back to-morrow, but is always the same? A. Every day.

Mr. FULTON.—I object to counsel cross-examining him; leading and suggestive.

Mr. WELSH.—Q. The same tide?

A. Yes, sir.

(Testimony of Moses Hirschy.)

Q. Now, this eddy,—is it or is it not practically in the locations where we had our set nets?

A. Yes, sir.

Mr. FULTON.—I object to that as leading and suggestive. (Last question read.) That is a leading question.

Mr. WELSH.—Q. I want you to tell me this, Mr. Hirschy; tell me whether or not our locations, our set nets, were in the eddy or were not in the eddy.

A. They were in the eddies of course.

Q. Is that what you meant a moment ago when you said yes to my question?

A. I thought I answered your question, yes, sir.

Q. That is what you meant? A. Yes, sir.

Q. Did you mean to say our set nets were in the eddy? A. Yes, sir. [478]

(Witness continuing:)

These grounds are good fishing grounds and I think the best grounds on the Columbia River and is a good seining ground.

Recross-examination.

(Interrogated by Mr. G. C. FULTON.)

Q. Now, Mr. Hirschy, I think you told me that the inside buoy to the set nets of Mr. McGowan were about eight or ten feet from the shore at extreme low tide, did you not?

A. There might be such a thing; I said 30 feet.

Q. You testified a while ago—

A. At extreme low water.

Q. Yes. Then you testified awhile ago that this

(Testimony of Moses Hirschy.)

eddy you spoke of was 150 fathoms from shore at extreme low tide.

A. No, I said 150 fathoms in width.

Q. You said it was 500 feet from the shore at extreme low tide? A. Yes, sir.

Q. Five hundred feet from the shore at extreme low tide? A. Yes, sir.

Q. If the inside buoy was only 30 feet from the shore at extreme low tide and only out 100 feet, that would make it 150 feet—you would still be 150 feet inside of the eddy?

A. That is what I said, something like that.

Q. Mr. McGowan's set net would still be 150 feet inside of where the eddy was?

A. The eddy is wider at one end than it is at the other.

Q. You said it was about 500 feet from the shore at extreme low tide; that is what you told me.

A. That is the way it forms; that is the way the eddy forms.

Q. And the inside buoy of Mr. McGowan's set nets was 30 feet from the shore?

A. At low water. [479]

Q. I am talking about low water all the time. Then, if his net is only 100 fathoms, he would not get any part of the eddy at all, would he?

A. I never told you the net was 100 fathoms long, I never mentioned the length of any, long.

Q. Was it 100 feet in?

A. I never said the length—I never saw anything but a little piece of wood on it.

(Testimony of Moses Hirschy.)

Q. It did not reach anywheres near the eddy?

A. If you put it in the eddy it will reach.

Q. Where it was anchored it did not reach there by 500 feet, did it?

A. I don't know nothing about the net proposition, because I never saw one there.

Q. You do not know whether it was off the eddy or in the eddy? A. I know it was in the eddy.

Q. It was 500 feet from the shore, wasn't it?

A. At high water—at low water, medium water, I said 600 feet, medium low water.

Q. How far is it from shore at ordinary high water? A. I should judge, I don't know—

Q. It would be over 1000 feet at high water?

A. I don't want to say exactly; I should judge, my estimation.

Q. If it is 600 feet from shore at low water it must be about 1,200 feet from shore at high water, wouldn't it? In other words, the net would not move out any further, would it; the net would sit stationary?

A. If you put it stationary.

Q. It was put stationary, wasn't it?

A. I never saw no net to amount to anything.

Q. I don't know what you mean by location.

A. I said, net location. [480]

Q. What do you call set net location?

A. The set net, what they call set net location, here, and one here, and one there, and one, and so forth (witness indicating table).

Q. What do you mean by set net location?

(Testimony of Moses Hirschy.)

A. I guess I am the one that don't understand.

Q. I think it is my fault; what do you mean by set net location?

A. In fact, I don't know much about these locations.

Q. You just wanted to please Mr. Welsh, and wanted to tell him this was as near the eddy as you could?

A. I just said the eddy and his location were in that eddy.

Q. Tell us what you mean by location.

A. Set net location—

Q. Are the buoys anywhere near it, either of the buoys? A. You call them buoys, this location?

Q. Yes. A. Well, that is different.

Q. Were these buoys anywhere near it?

A. They were right in the eddy.

Q. Then, they were over 600 feet from the shore at low tide, according to your figures.

A. Explain that again.

Q. I understood you to say that this eddy was 600 feet from the shore at low tide.

A. I said it, yes, as near as I can.

Q. Then you said that the buoy Mr. McGowan put out there was in the eddy. A. That is what I said.

Q. That would make the buoy over 600 feet from the shore?

A. Yes, at low water, considerably less at high water.

Q. His outside buoy would be over 600 feet—would

(Testimony of Moses Hirschy.)

be at least 600 feet from the shore at low water, is that correct? [481]

A. I know that them buoys was in the eddy and they were out 600 feet, by my judging, out in the eddy from high-water mark.

Q. From high-water mark, I see. At low-water mark they would not be in the eddy?

A. They would be in the eddy just the same.

Q. At low water.

A. Yes, sir. I can take you and set you in a place and you stand there, and you have to get out of there pretty darned quick. I can set you in another place and you can set there all day and the tide would not drive you out.

Q. I understood you to say that this eddy shifted with the tide? A. I said that, yes, sir.

Q. Which buoy was out in the eddy, the inside buoy?

A. I just seen one buoy, I never seen two buoys. You mean two buoys on one, yes.

Q. This buoy 30 feet from the shore was the one in the eddy? A. Yes, sir.

Q. That is perfectly clear. That is satisfactory.

Witness excused and hearing continued to April 24, 1912. [482]

April 24, 1912.

Parties met pursuant to adjournment at 9:30 o'clock, A. M.

[Testimony of H. S. McGowan, for Defendants.]

H. S. McGOWAN, a witness on behalf of the defendants, after being first duly sworn on oath, testi-

(Testimony of H. S. McGowan.)

fied in response to interrogatories propounded to him by counsel for defendants, as follows:

My name is H. S. McGowan; I am one of the defendants in this action; my occupation is canning salmon and fishing. I have had experience in fishing on the Columbia River ever since 1879 or '80, and have been since that time continuously engaged in the operation of fishing gear for the purpose of catching salmon fish. I am president of P. J. McGowan & Sons, a corporation; that corporation is engaged in canning and packing salmon and carrying on fishing operations on the Columbia River in Oregon and in Washington. I have had experience in the operation of set nets, drag nets, and other gear, in fact with every sort of gear that has legally operated on the Columbia River so far as I know. My earliest experience was with drag seines and pound nets and trap fishing.

Q. Are you acquainted with Sand Island?

A. Well, I am acquainted with second Sand Island. I presume you mean the one near the mouth of the Columbia River.

Q. Yes, sir. A. Yes, sir.

(Witness continuing:)

I am acquainted with Sites numbered Two and Three on this island. I operated fishing gear in front of Sites Two and Three for salmon fish prior to the location of the set nets involved in this suit. The last drag seine I operated there was up to and including the season of 1907. When we first used [483] these grounds and fishery it was along

(Testimony of H. S. McGowan.)

about 1893 or '94. I could not tell you exactly the year, but that was with pound nets or traps. The conditions were very much different then than they became later on. Afterward the pound nets were discontinued. A man by the name of Brumbach at Ilwaco utilized the portion of the territory for drag seine fishing, and our company bought those fishing rights, and his outfit as well, from him, in the year 1902, if my memory is correct, along about there, and we operated it continuously as a drag seine fishery from then until and including the year 1907. In the meantime we had purchased some other fishery rights and fishing outfits from another party that had a part real and part claimed right over a portion of that same territory, and in order to clear up the entire matter and get the fisheries in condition we thought we could get the best results out of them, we bought the other party out as well as a man by the name of Reischman. That portion of the Columbia River south of Sand Island is the most favorable portion of the entire river so far as I know for salmon fish. I know this from actual experience there, and I know they congregate there in large quantities.

I am also acquainted with other parts of the Columbia River from the lower Cascades down to the mouth, and I consider the south side of Sand Island and in front of Sites Two and Three as the best location on the river for fishing purposes. I have heard more or less fishermen express their opinion and they are all of the same opinion, that is, that it is the best fishery in the river for salmon. That is during the spring

(Testimony of H. S. McGowan.)

season, I am not speaking of the winter, and it has the general reputation among fishermen and those engaged in salmon fishing, to be the best location on the river. The southern shore of Sand Island is, I should say, a little less than three miles long; it may be fully three miles long. Of course, with the underlying sands, I suppose, that lay out below it, it is more than maybe four or five miles long, but the portion [484] that comes bare at low tide on the southerly shore is perhaps three miles in length, and it describes not exactly a crescent, but very nearly, a portion of the crescent in general outline, with a number of indentations. At the easterly end of the island the waters from behind, or from Bakers Bay, properly speaking, move out past the end of the island, as they come in contact. Those waters come in contact on the ebb tide with the westerly current setting down on what is called the north channel of the Columbia River, and those currents meet at approximately right angles, with the result that the north channel—the northerly edge of the north channel—is pushed in shore to the southern, and it creates to a considerable extent, where those waters become merged, a sort of a whirling motion of the water, including eddies, not one but millions—various small eddies merged in one large eddy, which at periods of the tides is very wide and extends quite a way out in the river, sometimes it don't extend nearly so far out in the river, but that has a controlling influence on the flow of the water down there and alongside the entire south shore of the island, and at any rate the

(Testimony of H. S. McGowan.)

result of the water's actions and the current's actions has caused the island to take, on the south shore, the form of a crescent, with numerous indentations, and occasionally little points extending slightly out into the bend of the crescent, and these little bays extend back further into the crescent with quite a pronounced turn, deeper and larger just inside, and easterly of what is known as the great "Republic" wreck. The general result is that the main channel of the river takes more or less to a straight line to the outside of this bend, created by the crescent in the island, and these indentations, and the eddy, generally speaking, occupies that space between this channel line or main current line and the shore of the island, and there are many variations, of course, in the action of the water at different places and different tides, and different stages [485] of the tide, in that area, but in general it constitutes an area of eddies as distinguished from a general current or channel. These eddies extend out at various distances at different times of the tides—on different tides and at different places, I have seen eddies at times when the current of the river had slacked and the main channels of the waters were beginning to get quiet, just before the low-water slack, and before the flood began, when the current would be comparatively even, over the entire area, there would be very little current in the channel and there would be very little current elsewhere, because generally speaking the action and the size and the strength of an eddy depends very largely on the strength of the

(Testimony of H. S. McGowan.)

channel movement. When there is a very powerful strong channel movement there is apt to be a correspondingly strong eddy movement on the inside, and they may throw a portion of it in a contrary direction with the channel movement; part of it may be in the same direction or at an angle from that, or merely variations.

I have seen these eddies extend out from the southerly shore at times as far as 1500 feet. I have seen it at other times when it was just about the time of slack water, there at low tide, or at high tide, there was absolutely no difference in the water anywhere so far as its movement was concerned. I should say that this eddy extends over 100 fathoms. I have seen it extend out at least 1500 feet in places, and have seen that eddy where it required the biggest part of 300 fathoms of net to go out past it. This eddy extends in front of said sites numbered two and three. The main channel of the Columbia River is further south than this eddy. The location of this channel with reference to such eddy depends upon circumstances. The channel, as I understand the channel of the river, would mean the usable, practicable, channel for such traffic as pass there,—vessels. While the greatest depth of water in the basin of that river between [486] there and the jetty and the cross-section across the river is perhaps eighty feet, I should consider the channel would not really gain until it had gone out over four or five hundred fathoms of water, because the vessels that ply there draw, many of them, over 20 feet of water, and it requires

(Testimony of H. S. McGowan.)

some water under their bottom for safety. I would consider the channel begins somewhere around the four fathom line.

I am in a measure acquainted with the place in the Columbia River where fishermen are fishing for salmon fish, drifting back and forth with their drift nets. A gill net fisherman is apt to drift any old place where he thinks he can catch fish, but as to the matter of a man drifting in that portion of the river, the main and principal drift is in the north channel, right next to this eddy at Sand Island. The great bulk of the fishermen drift down through there. They let out their nets and the main or principal drift is along about half ebb tide; some will put out their nets before and some after, and they come from various places. Many of them will lay out their nets as high up as Pt. Ellice, which is about four to six or seven miles above there. Others will lay out near the Desdemona Sands opposite Sand Island; others will lay out in front of McGowan, two or three miles above there; others will lay out in the neighborhood of Desdemona Lighthouse, which is between the middle channel and south channel. And these people lay out their nets with the idea of drifting down to the lowest part of the ebb tide and meeting the coming back movement of the flood around in the neighborhood of the "Republic" wreck, either below there or above there, or around in that neighborhood out in the edge of the channel, and the result is that a great many nets congregate down in that neighborhood along about low water—because the first fishermen

(Testimony of H. S. McGowan.)

that reach that point—the first drift coming down, they strike the slackening current before the back up of the water in the tide [487] in the ocean, while the men further up stream will have the ebb tide to bring them down. The men congregate, and the nets become extremely thick; at times I have seen the nets so thick if you tried to cross within fifty feet length you may have two or three cork lines under your keel at the same time, they get that thick out about the "Republic" wreck, and extend from there nearly to the jetty sands on the other side of the river.

The main drift of the current in the river to this eddy which I spoke of, is to the south, as I have just explained. I was familiar with the locations of my set net location in front of said Sites Two and Three and with the location of the other defendants, and they were placed in the eddy which I have described. From my knowledge and experience as a fisherman the place where these set nets were located—I have reference to both my own and to those of the other defendants—was a practical place for the fishing of salmon fish with set nets in the Columbia River. Each of these set nets were outside of extreme low tide south of the island, and I should say maybe 400 or 500 feet apart.

Coyote is not a general or continuous method, it is a short intermittent method of catching little schools, and the fish are there at particular spots, and at particular times. It is indulged in by some fishermen at some places when they think it is favorable. They engage in that selecting a place where they think they

(Testimony of H. S. McGowan.)

might catch some fish from, for some reason or other, and a place is perhaps limited in area, or the physical conditions such that they cannot keep their net in the water for any considerable length of time, and they will take a position which they consider is the most favorable part of that area of the water, and they will lay out a portion of their nets, such portion as they think they can handle with the best result, and they will lay that out and drift, or lay in that particular locality as long as they see fit, or as long as they can keep it there [488] without running an unnecessary risk, and then they will take it up and if there happens to be a down current in that point and they have a good place to fish they go back where they came from and repeat the operation. They sometimes will throw a rock over to hold the net in position so that it won't drift so fast, or keep it from drifting at all, if the current is mild.

Now, with reference to the waters in front of Sites Two and Three, there are gill net fishermen that fish at times in there, and generally speaking a gill net fisherman will dump his net down any place and fish, if he thinks there are any fish there. The coyote method is used there. Occasionally a man will drift in there, or at least a portion of his net may drift in there, but the most general drift is on the river. They don't lay out here and another there and drift out in procession at all. It is generally a small portion of the net that comes in, or they may come in and lay their net out practically stationary. Of course it won't be absolutely stationary. They aim to do as

(Testimony of H. S. McGowan.)

little drifting as possible, because they cannot stay long if it really drifts. If they drift with the flood tide they will be carried out by the ebb tide and they will go on the spit or "Republic" wreck, one or the other.

Q. You being acquainted with the locations of the defendants in this suit, in the waters of the Columbia River, you may state and give us your opinion from your knowledge and experience, how many fish would have been caught by the defendants on these locations had they been permitted to fish them as compared with the number of fish caught by a drag seine.

To this question counsel for the plaintiff objected on the ground that it was incompetent and immaterial and does not come within the rule for the measure of damages in this case. [489]

A. There would be a large quantity of fish caught. Of course it would be impossible to state just how many, or just what percentage that might be taken in comparison with some other class of gear, but I believe the catch would compare favorably with the catch of other classes of gear, and I think it would compare favorably with the catch of the drag seines.

Q. Supposing these defendants had not been enjoined and restrained in this suit from operating set nets in the locations in question, give your opinion as to the amount of fish that would have been caught by them as compared with the number of fish that would be caught with a drag seine on this territory in those waters.

To this question counsel for plaintiff objected upon

(Testimony of H. S. McGowan.)

the ground that the same was incompetent and immaterial and does not come within the rule for the measure of damages in this case.

A. Well, they might not catch as many and again they might catch as many. Possibly if the drag seines were operated by a first-class, industrious man, that had had experience in the use of seines at that particular place, they might catch more than the nets could. On the other hand, if the seine was handled by a man who did not understand or was incompetent or negligent in the use of it, why, he might not get as many as the set nets would catch. But assuming that both were handled in the ordinary method, by men who understood their business, I think in that case the drag seine would probably catch more fish; but on the other hand, the set nets would catch a great many fish. [490]

Q. About how many more fish would the drag seine catch, if any?

To this question counsel for plaintiff objected upon the ground that it was incompetent and immaterial and does not come within the rule for the measure of damages.

A. I think set nets would catch two-thirds as many as the seines.

Q. Now, will you state the comparative cost of the operation of the drag seine as compared with the operation of the defendants' set nets, had they been permitted to operate them in these waters at that place?

To this question counsel for the plaintiff objected

(Testimony of H. S. McGowan.)

upon the ground that it was immaterial and that the witness has heretofore fully testified concerning this same question and that it has been gone over very fully.

A. To the question of operating the drag seines, of course it is greater than that of the set nets, and it would depend upon the length of time they were operated. If they were operated in the most favorable part of the season, why they probably could be operated at an expense of something like $2,000. It would take some real experience to find out exactly as to that, because you might run against some conditions you did not know of beforehand. In its entirety that might vary the scope of your operations or some of your methods, possibly. I am giving my opinion. In regard to the comparative net results as to the operation of a drag seine there, of course that is difficult to state, but I think the results would compare favorably. The drag seine would cost more to operate and perhaps catch more fish, but the set nets would cost less to operate and might catch less fish, but the [491] proportion of gain would be larger in the cost of the set net; ought to be.

Q. Assuming that the drag seine which is operated by the plaintiff on this ground or in the waters where the defendant would have operated their set nets, caught in 1911, 360 tons, or practically that, of salmon fish—

To this question counsel for plaintiff objected upon the ground that the testimony in this case shows plaintiff's seines were operated in front of Sites One,

(Testimony of H. S. McGowan.)

Two and Three in 1911.

A. I would say these nets ought to get two-thirds as much fish, or thereabouts. It is largely a matter of opinion. It would depend of course on the skill and experience with which the gear was operated. The fish are in there, there is no question about that, merely a case of knowledge and skill and force, with which the business is carried on. Where the defendants had their set nets there were more fish to be caught there than any known place on the Columbia River. There is where they congregate and make their first movement upstream and you get the first shot at them. It is a good deal like shooting into a flock of ducks, you get the solid bunch, you get the best of it.

(Witness continuing:)

The price of salmon for the year 1911 was six cents per pound for salmon under twenty-five pounds, and above that salmon for cold storage purposes was seven and a half cents per pound, and the price of steelheads varied all the way from six cents to eight cents, according to circumstances and locality. And these prices were maintained by canneries and cold storage plants until about the middle of August. At that time the price on the river [492] came to what was called a flat price of six cents for all kinds of salmon, regardless of weight.

My recollection of the prices in 1910 were that they were five and a half cents for what is known as cannery salmon, and seven and a half cents for cold storage salmon; that is my recollection. The

(Testimony of H. S. McGowan.)

prices have been changing to some extent on some varieties nearly every year, and I am speaking from memory only.

The price of cannery salmon in 1908 was five cents per pound, I believe, either five or five and a half, and cold storage was, I think, seven cents per pound.

The price of salmon in 1909 was five and a half cents for cannery salmon and seven cents for cold storage.

Q. Now you may give us the comparative quantities of the run of fish in the Columbia River for the years 1908, 1909 and 1910 as compared with 1911.

A. Well, that is a little difficult to give for this reason: One portion of the river may have a better run this year than any other portion, and yet the aggregate catch on the entire river may be larger during the year, when this particular portion had a smaller run. For instance, you take it in the year 1911 and the catch of salmon on the upper—middle and upper Columbia River, was less than it was in 1910, but the aggregate catch of the entire river was larger than it was in 1910; I would suppose fifteen per cent greater. The run in 1909 was somewhat less than 1910 and 1910 was somewhat less than 1911. I am speaking of the aggregate of the entire river, not of any particular point on the river. We don't compare any particular branch of the river because one branch on a smaller season may do better in fish than the same branch does on a good, big season. In 1908 the run was a little better than it was in 1909, if my memory serves me right. By run, I mean the

(Testimony of H. S. McGowan.)

number of salmon fish caught in the river that year. [493]

Q. What I am trying to establish is about what the average run of salmon would be at the place where your set nets were located, the aggregate run. Can we determine that by the aggregate run of the fish for the various years?

To this question counsel for the plaintiff objected upon the ground that it was immaterial.

A. Well, there would be an average, of course, taking a considerable series of years, but one season taken with another varies. Some season will vary not more than five or ten per cent, but other seasons may vary from fifteen or twenty or twenty-five, one season with another.

Q. How do you determine whether a location is a good location for the fishing of salmon fish?

A. It is determined primarily on the catch that is capable of being taken there, and in its relation to the cost of getting them, and in taking the aggregate catch of the locality, and the expense bill for catching them, I determine what profit can be made out of it, and of course that fixes the method of getting at the value of the fishery. But there would be no way that you could get the average. You could, of course, estimate, but your estimate might be below and it might be above.

Q. If I go to you to sell you a fishing location and I would give you the number of fish that I caught for a certain year or season and tell you the kind of gear I used to catch the fish, how would you deter-

(Testimony of H. S. McGowan.)

mine its value, or how would you determine as to whether or not it had any value for fishing purposes? [494]

To this question counsel for the plaintiff objected upon the ground that it was incompetent and immaterial and not a subject for expert testimony or opinion; it was a matter of common sense.

A. Of course, I would know from experience if I was familiar with the details of the business—that branch of the business—I would know about what the cost accounts were in conducting that business and know in a general way, possibly not absolutely accurately, but in a general way, in lump sums, about what this output of fish was, and I would know in a general way what the value of that fishery was.

Q. Assuming that in the waters of the Columbia River where the defendants had their set nets, and being the place from which they were excluded by the plaintiff in this suit, now, assuming that the plaintiff caught 360 tons of salmon fish with a drag seine, for the year 1911, you may from your knowledge and experience as a fisherman state whether or not that is a good or bad location for fishing purposes.

To this question counsel for the plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial.

A. I would say it is a good one. It is a better locality than any other place on the river.

Q. Now, have you had any experience with reference to the leasing or the renting of fishing locations?

(Testimony of H. S. McGowan.)

A. I have, and gear as well.

Q. Do you know the annual rental value of a fishing location? A. Yes, in a general way. [495]

Q. Do you know the value of the use and occupation of a fishing location for a year?

A. I don't quite catch the question.

Q. Do you know the value of the use and occupation of a fishing location for a year?

A. Yes, generally speaking I do. Of course, that depends a good deal on having pretty accurate knowledge of what the location is that is in question.

Q. Now, will you state what it is?

A. The general rule—

Mr. FULTON.—I object; it is incompetent, immaterial, and irrelevant; not responsive to any issue.

A. The general rule is to this effect, that any good, standard fishery—I am not talking about any bum fishery, I am talking about a good, standard fishery—that one-third of the gross catch goes to the owner of the fishery providing that the man that leases from him and operates it furnishes everything, but if the man that owns the fishery rights, furnishes the outfit and gear and all that, and the other fellow carries it on, there is a square division of half and half—each man takes half of the gross catch.

Q. Do you know the market value of this leasehold or rental?

Mr. FULTON.—That is objected to as incompetent; the witness himself is incompetent.

A. Well, the market value is according to the rule

(Testimony of H. S. McGowan.)

I have just told you, would be one-third of the gross catch.

Q. One-third of the gross catch of fish?

A. Yes, sir, that is, to lease it—market value of the lease.

Q. Would that rule apply to the location where these defendants had their set nets in the waters of the Columbia River? A. It would.

Mr. FULTON.—Same objection. [496]

A. That is a good place to apply it. Ordinarily a fishery as good as that, so much better than the average, a man that wanted to lease it would get more than one-third of the gross catch in order to get the privilege of fishing, but that is above the average, you understand, because it is a high-grade fishery.

Q. This particular location? A. Yes, sir.

Q. Assuming that the plaintiff, with the use of a drag seine, caught 360 tons of salmon fish in the waters of the Columbia River, at the place where the defendants had their set nets, and where they would have been operated had they not been enjoined, you may state what the market value for the use and occupation of that fishery right would have been for the year 1911.

Mr. FULTON.—I object to that as incompetent, also upon the further ground that the evidence shows the plaintiff in making this alleged and estimated catch, operated drag seines, and also operated Sites No. 1, 2 and 3.

Mr. WELSH.—Q. You may answer the question

(Testimony of H. S. McGowan.)

now. Assuming 360 tons were caught, you can figure the rental.

Mr. FULTON.—Same objection.

A. It would be one-third of the 360 tons; it would be 120 tons.

Q. All right. For all these set nets?

Mr. FULTON.—That would be how much a ton?

Mr. WELSH.—One hundred and twenty tons at six cents a pound.

Mr. FULTON.—It would be $600.00 a ton?

The WITNESS.—No, the average selling price would be about $130.00 a ton.

Mr. FULTON.—Q. It would be $130.00 a ton?

A. Yes, sir; six cents for the cannery fish and seven and a half for the cold storage. [497]

Mr. WELSH.—Q. What would the fish average, would they average six and a half cents?

A. Why, I just said about $130.00, the ton; that would be about six and a half cents. Usually the salmon will average up to about fifty per cent of the cold storage sizes and about fifty per cent cannery size, but during the last part of the season sometimes, as occurred in the case of last year, the cannery and cold storage prices merged, and in that case less than fifty per cent of the catch would be cold storage size and more than fifty per cent would be of the cannery size, so far as prices are concerned.

Q. The value of the fish, assuming your figures are correct, would be about $15,600.00 for that year, that the set nets would have caught?

A. Yes, sir, about that.

(Testimony of H. S. McGowan.)

Q. It would cost about how much to operate these set nets?

Mr. FULTON.—I object to that; the witness testified that would be the actual rental value, one-third of the catch.

Mr. WELSH.—Yes, he did; that is right.

Q. What would be the annual rental value for the years 1908, 1909 and 1910 for which the defendants have been excluded?

Mr. FULTON.—Same objection.

A. It would be that portion of the gross catch, about one-third, whatever it might be.

Q. I want to show what it might be; would it be that much, more or less?

A. I haven't any means of knowing what it is.

Q. You have fished these grounds; you know the location, you know the catch of one year; you have operated fishing gear there. Now, give your opinion as to the rental value for the years 1908, 1909 and 1910. [498]

Mr. FULTON.—I object to that as incompetent.

A. Well, here is the only way I can get at that is in the common sense way. Now, you have asked me to assume there was 360 tons there in 1911.

Q. Yes.

A. 1911, 360 tons; now, my knowledge of the general conditions and what the fisheries did on the Columbia River at large, and what knowledge I have observed one way and another from that fishery and other fisheries, I would put it down this way, 1911, 360 tons; 1910, approximately 300 tons; 1909, ap-

(Testimony of H. S. McGowan.)

proximately 200 tons; and 1908 approximately 200 tons. Now, 1909 might be considered less than 200 and it might run down to 150, that is in relation to all those figures, starting with the first you gave me as 360.

Q. What is your opinion as to whether or not that would be correct?

Mr. FULTON.—I object to that as incompetent.

A. It would start on the basis of 360 tons, as you can.

(Witness continuing:)

We had eight set nets; I had two, defendant Lindstrom had three and defendant Coyle had three. I think my locations were somewhat better than the others. Generally speaking, the "Republic" wreck was—was generally considered as sort of a storm center, the character of the point for fishing, it is a kind of fishing center, the great "Republic" wreck. I mean all around it out in the channel, outside of it, and below it and above it. The purse seiners and gill netters and the likes fish there, and they anticipate good catches of fish there. Our locations were just inshore above, easterly from the wreck.

Q. Now, if the Court in this case should find any damage due to the defendants, in your judgment how should these damages be divided, whatever sum may be found, as between you three defendants? [499]

A. I think it would be fair to divide it equally between the defendants, or give them a proportion according to the number of nets they had in relation to the whole number. I think my two locations were

(Testimony of H. S. McGowan.)

as valuable as three of the other defendants. It would be satisfactory to me if the Court should find any damages due all of us to have an equal division made with the three defendants.

The defendants would have operated and used these waters for fishing purposes with their fishing gear had they not been excluded by the plaintiff, that is by injunction in this suit.

Q. Have you licenses now issued by the State of Oregon?

To this question counsel for the plaintiff objected upon the ground that it was incompetent.

Mr. WELSH.—I will send for them if you object on that ground.

Mr. FULTON.—It is absolutely immaterial—yes, I insist upon you sending for them outside of 1908, because you never had them.

Mr. WELSH.—I mean since—the Court has that part settled. I am not going into that phase of it. Here is the point: Since March 31, 1912, has the State of Oregon issued to you licenses for these locations?

Mr. FULTON.—I object to that as incompetent and immaterial, on the ground that the State of Oregon doesn't issue licenses for any locations, and furthermore that it is incompetent and not the best evidence. A. Yes, sir. [500]

Cross-examination.

(Interrogated by Mr. FULTON.)

Q. You have a license from the State of Oregon to operate your set nets in the year 1908?

(Testimony of H. S. McGowan.)

Mr. WELSH.—Objected to as being immaterial, for the reason that matter has been settled by the Court, and is *res adjudicata* so far as the plaintiff is concerned, and it is not in issue at this time.

A. You have reference to the trap or set net?

Q. Set nets in front of this ground.

A. For the year 1908?

Q. Yes. A. Yes, sir.

Q. Did you put up any Oregon license number?

Mr. WELSH.—I object to that as incompetent, irrelevant and immaterial, and for the further reason that matter has been settled by the Court and the Court has held and decided that the plaintiff unlawfully excluded the defendants from the fishing locations, and that the defendants had a prior and exclusive right to fish in these locations. And to all this class of testimony it is agreed that the defendants have made this same objection, and it will save repeating.

Mr. FULTON.—Sure, and every other objection the ingenuity of counsel might suggest.

A. I don't know that we did.

Q. Don't you know that you did not?

A. My impression is that we did not do it, but I would not be positive on that point.

Q. You are operating really under the Washington license?

A. We thought we were in Washington.

Q. You did not put up any—post any notice of the number of your Oregon license, neither did you

(Testimony of H. S. McGowan.)

stamp on your [501] corks the number of your license?

Mr. WELSH.—We object to the trial of the original action in this case.

Mr. FULTON.—I told you you could have any objections the ingenuity of counsel could suggest.

Mr. WELSH.—This is no place to try that.

Mr. FULTON.—You brought it out on direct examination.

(Last question read.)

A. I don't think that we did.

Q. Don't you know whether you did or did not?

A. I don't know that we did not.

Q. Will you swear that you did or did not?

A. No, I would not.

Q. Would you swear that you did?

A. No, I won't do that either.

Q. Don't you know anything about it?

A. No, I don't know whether we did or did not.

Q. Don't you know you did not?

A. No, I don't know that, sir; we may have and may not down there.

Q. Did you have an Oregon license to operate a set net in front of this site in 1909?

A. No, we did not take out any license for 1909 in front of that site, in Oregon, I mean.

Q. Did you or either of the defendants have issued to you for the years 1909, and 1910 any license from the State of Oregon—any license to operate set nets in front of Sites 2 and 3 of Sand Island?

(Testimony of H. S. McGowan.)

A. 1909 and 1910?

Q. Yes.

A. Not from the State of Oregon; we were enjoined at that time, you know. [502]

Q. Did either of the defendants, Coyle or Lindstrom, post any notice of the—any set net notice under the Oregon license for the year 1908, when you first appropriated these grounds?

Mr. WELSH.—The defendants object to all this class of testimony on the ground that it is entirely immaterial, nothing involved in this issue here, and that it is an attempt by counsel to try the original suit, which was decided by this Court.

A. That is the Oregon license you have reference to?

Q. Yes. A. I don't know that we did, sir.

Q. As a matter of fact, you thought you were operating under the statutes of the State of Washington?

Mr. WELSH.—Same objection, and for the reason all that testimony was brought out in the original suit.

Mr. FULTON.—I wish to withdraw my stipulation in which I stipulated counsel should be allowed to object to questions I ask. Counsel does not seem to want to be bound by his, and I do not care to be bound by mine. I will abide by the stipulation if you will. If you won't, I will not.

(Last question read.)

A. Well, we certainly did at the time we took out our locations originally and made them.

(Testimony of H. S. McGowan.)

Q. You had your Oregon license number on your cork lines—your Washington license number on your cork lines?

Mr. WELSH.—I object to that as incompetent, irrelevant and immaterial, and for the further reason the Court has decided and determined this question adverse to plaintiff, and the only thing we are to determine here is the damages to deal out to the defendants, if any.

A. I could not tell you that, I don't know. [503]

Q. Under the laws of Washington you were required to post a notice with the number of your license plainly printed on it for set net purposes, weren't you?

Mr. WELSH.—Same objection.

A. Same location?

Q. Did you not do that with these locations?

A. Yes, sir.

Mr. WELSH.—Same objection.

Q. Did the other defendants do that with their locations? A. Yes, sir.

Q. So, when you located your set nets in controversy here, you posted a Washington license in accordance with the laws of the State of Washington?

A. Yes, sir.

Mr. WELSH.—Same objection.

Q. But you do not know whether you did in regard to the Oregon license, or not?

Mr. WELSH.—Same objection.

A. I don't know that we put the Oregon numbers on the location marks or not.

(Testimony of H. S. McGowan.)

Q. Don't you know whether it was long after you located your net that you got the Oregon license?

Mr. WELSH.—Same objection.

A. We could do that any time, however, on the Oregon license, but whether we did it or not I could not tell you.

Q. You do know you posted your Washington license?

Mr. WELSH.—Same objection.

A. Yes, sir.

Q. You do know it was long after you got your Washington license?

A. It was subsequent. [504]

Q. It was after the suit began that you got your Oregon license?

Mr. WELSH.—Same objection.

A. No, sir.

Q. Now, you never operated a set net in front of Sand Island on the south? A. I never did.

Q. Did you? A. Personally I never did.

Q. Well, did you indirectly operate one?

A. Yes, I had other men employed in that business and was associated with others.

Q. How long did you operate a set net there?

A. Not very long.

Q. Well, how long?

A. Well, I guess we weren't actually operating but comparatively few days.

Q. How many days, about?

A. It may have been a week or two or three days, or ten days.

(Testimony of H. S. McGowan.)

Q. How many nets did you operate?

A. Well, I think perhaps we had two or three out at one time; we had a number in course of preparation, but we were just beginning so far as our set nets operations were concerned.

Q. You had about three set nets out and operated them a week or ten days, maybe two weeks?

A. We had two or three out at one time; we had them on different locations, but I don't think we had more than three in the water any one particular time.

Q. And they were operated there ten days, or possibly two weeks?

A. Might have been that long; the season had actually not begun for that sort of fishing.

Q. How many fish did you catch in them?

A. I don't know that we caught any fish, but we evidently [505] caught some fish, but I don't know that we got any home. I think we had some fish swiped from us; I don't know, but I think we did. We had not taken up our headquarters so as to guard the nets and take care of them continuously.

Q. You do not know whether you caught any fish or not? A. No, sir.

Q. I understood you to say, in determining the value of a fishing right, that its value entirely depends on the profit made from it. If there is no profit made from it, it is of no value as a fishing ground?

A. Generally speaking, that is true.

Q. Yes, that is true of every business. Now, in estimating the value of this fishing right—this alleged fishing right of yours south of Sand Island, you have

(Testimony of H. S. McGowan.)

assumed, of course, that you had the exclusive right to operate set nets there, haven't you? A. Yes, sir.

Q. If you did not have the exclusive right to do so, your value would depend largely upon that question?

A. Well, it might depend on that question to a certain extent; to what extent, I don't know.

Q. You never knew of anyone operating a set net there other than such set nets as you attempted to operate on these grounds yourself?

A. No, that is not in the way we contemplated to operate them.

Q. Or anyone? A. Oh, yes.

Q. On the south side of Sand Island?

A. Yes, sir.

Q. Who operated there?

A. I cannot give you the names, but I have seen dozens out there some days, right on the same location. [506]

Q. That is gill nets?

A. They were using their gill nets as set nets.

Q. They weren't anchored?

A. They were anchored.

Q. On both sides?

A. I do not know what you mean by that.

Q. Both ends?

A. They were anchored all the way long they were in the water.

Q. What sort of anchor did they have?

A. They had leads on the bottom of their nets, and they knew the leads were heavy enough to hold them there at that time.

(Testimony of H. S. McGowan.)

Q. Those were the only ones you saw operated there, gill nets?

A. Yes, other than ours. They used them as set nets, however.

Q. That is right square where you had your set nets? A. Right there in the same country.

Q. In the same locality?

A. I could not say in the same locality, in the same vicinity.

Q. You saw them?

A. Yes, I saw them; sure, I saw them.

Q. How did they get in there?

A. Some of them sailed in there; I don't know about any motors in their boats. Sometimes they were rowing in, and sometimes they would sail in.

Q. So, as a matter of fact, when it comes right down to brass tacks, these operations of the set nets in front of these premises by permanent anchors is a pure experiment, never has been tried, and you don't know whether it would work or not; it is only and simply an experiment, in the experimental stage, and you might possibly be mistaken in your theory?

A. No, I would not be mistaken, because it would have to be different from any other place I ever knew. [507]

Q. But, I say, it is purely in the experimental stage?

A. Well, in a sense it is an experiment, as to the best results that can be gotten; other than that it is not an experiment.

Q. There never has been a set net operated there as

(Testimony of H. S. McGowan.)

a set net with permanent anchored ends?

A. Probably not, I don't know that there were.

Q. Therefore, Mr. McGowan, it must be an experiment; it can not be anything else?

A. Not in my opinion.

Q. Nobody has ever done it. You never saw anybody doing it, and no living man has ever tried it but you?

A. That is no reason that a man might not have an opinion that it was a mighty good place to do it.

Q. That is the point; that is the point; I don't question but what you might have a mighty good opinion. Now, the Columbia River Packers' Association in 1911 operated Sites Numbers 1, 2 and 3, didn't they?

A. Well, I could not say, I was not down there; I knew that they were the successful bidders from the Government for the use of the shores on sites known as Sites 1, 2 and 3, and I presumed they fished there; I was not down there.

Q. You stated in your direct examination that you at one time acquired the fishing right in front of Site No. 2, I believe; wasn't it Site 2? A. Yes, sir.

Q. That fishing right that you name, that claim that you purchased, covered all of Site 2? A. Yes.

Q. Did it cover all of Site 3?

A. No, I don't think it covered all of Site 3, but it covered more than Site 2. [508]

Q. What was its length?

A. There was one purchased that we made from Brumbach that covered 4,000 feet, approximately,

(Testimony of H. S. McGowan.)

and from the Reischman Brothers, why, my memory may be a little faulty, but in the neighborhood of 3,500 feet.

Q. I understand you to say they had virtually no claim; you simply bought that as a matter of security?

A. That gives merely a general idea of it, but there was an overlap in the Brumbach ground, and in the Reischman ground; that is to say, the Reischmans thought their rights ran further up than Brumbach thought, and Brumbach thought his run further down than the other thought; there was an overlap there and we wanted to clear the whole thing up. We knew it was a valuable fishery and we did not want to have any controversy, and we purchased both, and we acquired 4,000 feet, something like that, and 3,500 feet, making about 7,500 in all. But there was an overlap there and we lost out on the overlap.

Q. About how much did you have after strengthening up your—

A. I should say we had from 6,400 to 7,000 feet.

Q. But that did not include all of Sites 2 and 3?

A. No, it did not include all of Sites 2 and 3.

Q. But your set nets included all of Sites 2 and 3?

A. The ground at that time extended down further, and not quite so far up, you see?

Q. Now, you bought this right you spoke of from a man by the name of Brumbach? A. Yes, sir.

Q. Brumbach lived in Washington?

A. Yes, sir.

Q. He was operating under a Washington license?

(Testimony of H. S. McGowan.)

A. He sure was. [509]

Q. Had his Washington license number up?

A. I think he had his license up.

Q. And he claimed it by virtue of the Washington laws? A. So far as I know he did.

Q. Never had an Oregon license, did he, to your knowledge? A. Not to my knowledge.

Q. You bought it, did you not, as a Washington license? A. Yes, sir.

Q. You operated it from 1903 until you lost out on your bid to the Government under the Washington license, exclusively?

A. We operated in 1903, 1904, 1905, 1906 and 1907, under the Washington license.

Q. Never had an Oregon license?

A. Not up to 1908, I don't think so.

Q. You got the Oregon license after the suit had been brought by the State of Washington against the State of Oregon to determine where the boundary line was?

A. I think while that suit was pending.

Q. As a matter of caution? A. Yes, sir.

Q. Whatever rights Brumbach had he claimed to have acquired them under the laws of the State of Washington—claimed as fishery rights?

A. You mean Brumbach?

Q. Yes.

A. So far as I knew he claimed under the laws of Washington. [510]

[Testimony of Moses Hirschy, for Defendants (Recalled).]

MOSES HIRSCHY, witness heretofore produced on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am the same party that testified here yesterday, and I am the same party that worked for plaintiff in its fishing operations in front of Sites 2 and 3 in the Columbia River. I have been near Sites 2 and 3 on Sand Island for the last four or five years, that is the license, when they used to nail up the licenses I nailed them up myself. Of course, I don't know on the land. I know on the land where the location of Sites 2 and 3 are. I have seen the licenses there; I put them up. The plaintiff caught most of our fish on Site No. 2; that is, what I would call Site No. 2; but here and there sometimes we made a lay out below No. 2 and landed on No. 1, but very seldom. We got most of our fish on No. 2 ground. We would lay out below the "Republic" wreck and land mostly down below it. Of course I know where we landed. I could not tell you from the land, but we landed on Sand Island. I said we fished in front of Sites 1, 2 and 3, but we laid out on No. 3 sometimes and landed on No. 2—strong flood we landed on No. 3. We used to take the fish out of the net in front of Site No. 3; not always, understand; sometimes you go down for instance, for an hour or two strong flood, you lay on

(Testimony of Moses Hirschy.)

the upper end of the island. When your tide slacks up you get down into No. 2 and lay on No. 2 until you think it is fit to fish. When we think it is time to make a haul we lay out where we think it is fit, that is all I know about this; but most of the fish was caught in front of Site No. 2. I think there was some fish caught in front of Site No. 1. We lay out on No. 2 six hundred and some feet, I could not say, 500 feet —I never surveyed or measured it. We lay out on No. 2 and close to the "Republic" and we might land on No. 1; I could not say, I [511] never thought I would come up here. I think they caught practically all or most all, of their fish in front of Site No. 2. There is no question about that in my mind; that is my judgment. I was there on the ground nine years every year. I don't ask anybody, I just tell my own judgment; I found that out if you ask anybody—I just tell what I know, that is all.

Cross-examination.

(Interrogated by Mr. FULTON.)

Chris Hansen and Olsen operated Site No. 2 in 1907. The Columbia River Packers' Association rented it in 1911 and Chris Hansen and Olsen operated Site No. 1 in 1908, 1909 and 1910. The people who had Site No. 1 could do nothing unless they had something on ground No. 2. No. 1 was not fit, you could not do nothing. No. 2 and No. 1 kind of worked together and made a fair ground. There was someone operating Site No. 1 during 1908, 1909 and 1910. In laying out a drag seine in front of No. 1 the seine

(Testimony of Moses Hirschy.)

would be put out, say as a matter of fact, in front of Site No. 2.

Witness excused.

[Testimony of H. S. McGowan, for Defendants (Recalled).]

H. S. McGOWAN, one of the defendants herein, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

Q. Mr. McGowan, with reference to Site No. 1, the Government site in front of Sand Island, tell us what you know about that with reference to being practical to fish in front of it, and what you know about the waters there for fishing purposes, in front of that Site No. 1. [512]

A. Well, it depends largely on what you want to use it for. Out in front of Site No. 1 a good deal of drifting is done with gill nets. I mean far enough out so that nets coming down will go clear of the "Republic" wreck, and go on down below. The "Republic" wreck is from 600 to 900 feet outside of low water. And if you mean in relation to the use of drag seines in a profitable way, why, Site No. 1 is almost, if not entirely, valueless, but almost valueless in order not to be able to utilize No. 2, lower end, because that is where deep water is and there is where you are in close proximity to the fish that come in. Now, the great "Republic" wreck lays at a point approximately 700 feet easterly of the west line of Site No. 2, so that there is a distance of between six and seven hundred feet from the "Delhara" wreck,

(Testimony of H. S. McGowan.)

before you come to the westerly limits of Site No. 2. In drag seining, the business that the plaintiffs were carrying on there, there was not room enough in that six or seven hundred feet to make a real seining ground, but the real valuable part of the seining ground was there, because the waters caused them to go in pools, and they could take the fish out on the lower end of Site No. 2, just below the wreck; but when there was an ebb tide running, in order to land those fish in a drag seine you would swing down on to Site No. 1, properly speaking, and make your landing.

Q. Then, according to your idea, there weren't a great many fish in front of Site No. 1 as compared with No. 2?

A. Not in a practical way to catch them. If you ran a net out in front of Site No. 1 without anchoring on No. 2 at all, you would get just the edge of the main deep waters where the fish were, and you would get some fish, but if there was any tide running you would not have any room [513] to bring your net in and land it without going into the rough waters of the breakers. Most of the time there is bad water. You get down in front of bad water and you cannot handle your net; you can make it fish too much; you have no good place to land it.

Q. In the cross-examination of Mr. Hirschy, Mr. Fulton brought out testimony of someone having used Site No. 1 for fishing, do you know anything about that?

A. A man by the name of Chris Hansen, I think

(Testimony of H. S. McGowan.)

his name was, he had Site No. 1 rented from the Government. I am talking about the beach, the shore, not a fishing right; he had that beach rented from the Government for the years 1908, 1909 and 1910, if I remember correctly, and he seined there. I believe he seined there during those three years, and he had the same kind of a tentative arrangement that he made with the agent of the Columbia River Packers' Association, whereby he used the westerly end of Site No. 2 from the "Republic" wreck down, in conjunction with Site No. 1, and during 1908 and 1909 he did not do very much business, even when he had that slight advantage.

Q. You mean that he did not catch much fish?

A. He did not catch much fish. It was not very profitable, in fact, he did so poorly in 1909 he wanted to shut off, he wanted to get out, but conditions were much more favorable in conjunction with the use of it in 1910 than it had been in 1908 and 1909, and he made a large catch down there. He made a big catch down there; I don't know how many fish he caught, but he got a lot of fish.

Q. What year?

A. 1910. Then the following year for 1911, and the succeeding two years, the Columbia River Packers' Association were [514] the high bidders on Site No. 1 as well as two and three, for the use of the shore.

Q. You say one year he made a good catch. Could he have made this catch without having fished in front in the waters of Site No. 2?

(Testimony of H. S. McGowan.)

A. In my judgment he could not.

Q. Did you see the plaintiff fishing in 1911?

A. In 1911?

Q. Yes.

A. I don't think I was down on those grounds during the year 1911, that is, during the fishing season of 1911. I think I was down on the island once in 1910. If I was down there at all, I was on Site No. 1 and also Site No. 2. I know that Hansen made arrangements with the Columbia River Packers' Association, because he told me so himself. My knowledge is that Chris Hansen was using the ground, that part of No. 2 as well as No. 1, and he had a quarrel with Hawkins, and Mr. Hawkins prevented him from continuing using it, and they had a squabble and the result was, to the best of my knowledge, and possibly Hansen partly receded from his position and Hawkins receded partly from his position, and the Columbia River Packers' Association got his catch of fish and he had the convenience of that end of the ground given to him.

Q. And he made a good catch?

A. He made a big catch, yes, sir.

Mr. WELSH.—Q. He fished in front of what site?

A. In front of the lower end of Site No. 2.

Mr. FULTON.—Q. In operating drag seines it is the universal custom to put the seines out in the water anywhere they can put them, regardless of site lines and shore. They have a right to navigate the waters? **[515]**

A. I don't know; some people have one theory

about it and some another.

Q. Isn't that the universal custom?

A. No, sir, I don't think it is.

Q. Do you know of a place where it is not so employed—where it is necessary to do so?

A. Why, I think a man operates a fishery if he owns the fishery.

Q. Wait a minute, that is not the question. I do not care to get into theory with you, because you are too theoretical and don't have much regard for the facts, when your theory goes up against it. Do you know of any place on the Columbia River where drag seines are employed and where it is necessary for the operator to put his seine in water above lands belonging to other people that he does not do that, or that it is not done?

A. I think that is true in case the party who owns uplands where it is necessary; there are no conflicting rights.

Q. They are in the water?

A. Certainly, they are.

Q. Their navigating the water with other fish appliance they are not interfering with anyone else, and naturally one operating Site No. 1 at an ebb tide would of necessity put his net in the water in front of Site 2, but it would be in the water. Have you got a map of Site No. 2?

A. No, I haven't. Do you want to put that in evidence?

Q. I would like to.

A. If you would undertake to get me another one

(Testimony of H. S. McGowan.)

I would be willing to have it go in.

Mr. WELSH.—Put it in.

Mr. FULTON.—Q. Is it a correct map of the south shore of Sand Island delineating Sites 1, 2 and 3, for all practical purposes? **[516]**

A. It purports to be, it is not a good map of the south shore of the island, though.

Q. I mean for all practical purposes, it gives you a pretty good idea?

A. Generally speaking, it is a fair map.

Q. Those sites on there, marked Sites 1, 2 and 3, refer generally to—rather are Sites 1, 2 and 3 in controversy in this suit? A. Yes, sir.

Q. Of course, it has high land in front of Sites 3 and 4—back of Sites 3 and 4 it is high ground, the water does not run over it?

A. It does not now; there was a time when it did.

Q. It has not for the last number of years?

A. For a year or more the water has not run over it.

Q. The ground is above high tide?

A. Yes, sir.

Q. On the map it appears that the land there is below high water, doesn't it? A. Sir?

Q. It shows on the map as if portions of Sites 3 and 4 are below the high water? A. Yes, sir.

Q. But as a matter of fact it is not now?

A. Well, there are parts that are continually above the high-water line, all along there.

Mr. FULTON.—Just for the information of the Court, and with the consent of Mr. McGowan, I will

offer this map in evidence.

Thereupon said map was offered in evidence and marked Defendants' Exhibit "F."

Witness excused. **[517]**

[Testimony of Ralph Grable, for Defendants (Recalled).]

RALPH GRABLE, a witness heretofore produced on behalf of defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am familiar with Sites Nos. 2 and 3 on Sand Island. In my judgment it is practical to operate the drag seines in front of Site No. 1 providing you can lay out the drag seine on Site No. 2 and land the seine on Site No. 1, but you practically catch the fish on Site 2, because there is another wreck, you must remember, which is one hundred fathoms from the "Republic" wreck—excuse me, two hundred fathoms from the "Republic" wreck, to the "Delhara" is as near as any fisherman can claim, about two hundred fathoms; and if you lay out there and catch this "Delhara" you might just as well catch the "Republic." It is only one hundred fathoms at low tide. Therefore, in my opinion, as a fisherman and with my knowledge of the actual grounds there you could not fish in front of Site No. 1 with a drag seine without fishing in front of No. 2. I am positive of that, because a man cannot run a seine for the simple reason I have seen these seines snag on the "Delhara" and they could not bring the seine ashore

(Testimony of Ralph Grable.)

on Site No. 1, and I have seen the plaintiff operate its seines there. The main fishing was done on Site No. 2, that is, in the waters in front of Site No. 2.

Cross-examination.

(Interrogated by Mr. FULTON.)

Olsen and Hansen operated Site No. 1 during the years 1908 and 1909 and 1910. They caught fish but they did not catch it altogether on Site No. 1, simply because they laid out on Site No. 2. They laid out in front of Site No. 2, because the ground **[518]** of Site No. 2 is 620 feet, according to the measurements, below the "Republic" wreck. They take their seines west of the "Republic" wreck.

Q. In other words, the gentlemen who operated Site No. 1 put their drag seine in a gasoline launch and then sailed the gasoline launch in the waters of the Columbia River and put out their seine in front of Site No. 2 and hauled it out in front of Site No. 1; that is about the way they did it?

A. Your Honor, I will tell you during all the fishing I ever saw on the ground, that if a man would only have Site No. 1 with grounds and seines that were fishing they could not fish Site No. 1 at all.

Q. After delivering that oration, answer the question. I said that the way that the gentlemen that operated Site No. 1 did was to put their drag seine in a skiff—I presume they used a skiff or a gasoline launch? A. Yes, sir.

Q. And they towed the skiff out into the waters in front of Site No. 2 and put their seine into the water, and then landed on Site No. 1?

(Testimony of Ralph Grable.)

A. Yes, that is what I said.

Redirect Examination.

(Interrogated by Mr. WELSH.)

Q. From your observation and your opinion as a fisherman we could, in front of Site No. 2—

Mr. FULTON.—I object to that as leading and suggestive.

A. The fish are caught on No. 2, because you cannot fish on No. 1 on account of the "Delhara" wreck in the middle of No. 1 current. I saw their seine snagged there in slack water when it was supposed to be their best haul, is the slack water haul.

Witness excused. **[519]**

[Testimony of Amon Markham, for Defendants (Recalled).]

AMON MARKHAM, a witness heretofore produced on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am the same person who testified yesterday and I am familiar with the sites in front of Sand Island known as Sites 1 and 2.

Q. You have been familiar with this location for a period of a great many years?

A. Must I answer the same as I did yesterday?

Q. Yes.

A. I have been fishing, outside of the capacity of deputy sheriff, and when I went to Alaska, for thirty-four years, living in Pacific County.

(Testimony of Amon Markham.)

Q. During all that period you have been acquainted with the Columbia River?

A. I certainly have.

Q. And in front of Sand Island?

A. Yes, sir.

Q. Now, you may state whether or not the plaintiff could fish in front of Site No. 1 for salmon fish?

A. Land a seine? Absolutely nothing.

Q. Why not?

A. There is a wreck—if I had to, I could draw a map.

Q. Just tell it in your own way and it will be all right.

A. After you leave the wreck of the "Republic," about 500 or 600 feet you meet the "Delhara," and you cannot land.

Q. The "Delhara" is in front of what site?

A. No. 1. **[520]**

Q. What is the "Delhara."

A. It is a wheat laden ship; she was sunk there.

Q. It is a wreck? A. Yes, it is a wreck.

Q. You saw the plaintiff operating a drag seine, did you?

A. I used to fish there with a drag seine, yes.

Q. Then you say it is impracticable and almost impossible.

A. It is impossible to land a seine, because you pick up this wreck.

Q. In Site No. 1. A. Yes, sir, Site No. 1.

Q. The plaintiff's fishing operations was confined

(Testimony of Amon Markham.)

to what site? A. To No. 2.

Q. In front of No. 2? A. In front of No. 2.

[Testimony of H. S. McGowan, for Defendants (Recalled).]

H. S. McGOWAN, one of the defendants, was again recalled and upon interrogatories propounded to him by counsel for defendants testified as follows:

(Interrogated by Mr. WELSH.)

I have had experience in fishing the waters of the Columbia River just south of and in front of Sites 2 and 3 of Sand Island. Speaking more particularly with reference to Site No. 3, during the year 1909—well, all the years from 1900 onward, and particularly with reference to the years 1905, 1906 and 1907, because the operations were carried on those years more in view of the limit lines of those sites. You see previously to 1905—I think it was 1905, there was no such thing known as Sites 1, 2, 3 and 4, but about the year 1904 or 1905, I believe it **[521]** was, the Government wanted to divide the island up, and that is what they did. They surveyed and made plats, substantially like this plat that was introduced in evidence this morning, marked Defendants' Exhibit "F," dividing the land into five sites. We were operating on Site No. 2. I do not have the record of the fish I caught during those years on that site, but speaking from memory, to the best of my knowledge and belief, I would say that in 1905 the catch on that site was approximately about 150 tons of salmon fish; in 1906 I think was about 220 tons,

(Testimony of H. S. McGowan.)

and in 1907 I think it was less. I think probably 120 tons, maybe.

Q. From your knowledge and experience as a fisherman and from the experience you had in fishing the waters in front of this Site No. 2 and from your knowledge of the location, state in your opinion what number of fish would have been caught by the defendants each year during the years 1908 to 1911, both inclusive, if they had been permitted to fish the location and had they not been enjoined in this suit.

To this question counsel for plaintiff objected upon the ground that it was incompetent and irrelevant and speculative.

A. Covering Sites Nos. 2 and 3 I would say on a general average we ought to have gone somewhere in the neighborhood of a couple of hundred tons, each year.

Cross-examination.

(Interrogated by Mr. FULTON.)

I operated Site No. 2 in the years 1905, 1906 and 1907, that is in front of it. Not under a lease from the Government, but in a secondary way. We operated our own fishery right there, but we used the beach in drag seining, and for the use of **[522]** the beach we got the right from a man by the name of Stensman, who leased it from the Government. Stensman was the highest bidder for Site No. 2 for 1905, and he bid for himself and not under any agreement with me. The Stensmans were interested in fishing down there, in fact had the ground there below the "Republic" wreck, now the lower end of

(Testimony of H. S. McGowan.)

No. 2 and the upper part of No. 1, and Stensman of course did not want to give up his seining business there, and he wanted to bid in order to do so and he did, and in order to bid at all on the ground he had previously, he had to bid on Site No. 2, and he was the highest bidder and we leased from him during all those years we operated a drag seine. We made no attempt to put set nets in front of said site during those years. I was one of the bidders for the Government sites when these sites were offered for leasing in 1908; that is, I think I was for the shore only. I think I bid for Site No. 2 in the neighborhood of $1,000 per year. I could not tell you the exact figure that Stensman bid for the lease of Site No. 2, but it was more than a thousand. I don't recall whether I bid for Site No. 3 in 1908 or not. My impression is I did not, but I might have done so. Again when the sites were offered for lease in 1910 I think I was a bidder. The Government at that time offered to lease them again for three years. I think I was a bidder for Sites 2 and 3. If I remember right, I bid for the use of Site 2 in the neighborhood of a thousand dollars, but I do not recollect what my bid was for Site No. 3. If I bid at all it would be somewhat less than that; I think it would be considerably less than that.

In the 150 tons of fish that I caught in 1905 there would be a few bluebacks, not many; the bluebacks were practically done with when we started seining along about the first of July, so that is almost a negligible quantity, but there would be quite a number

(Testimony of H. S. McGowan.)

of steelheads. The percentage of steelheads might be **[523]** ten or fifteen per cent, some years might be higher than fifteen. Chinook salmon under ten or eleven pounds would be a very small percentage. We do not catch small salmon down there.

Redirect Examination.

(Interrogated by Mr. WELSH.)

When I spoke of bidding for Site No. 2 in 1907 I could not tell you whether it was under my name or the name of P. J. McGowan & Sons that I made the bid. P. J. McGowan & Sons is a corporation organized under the laws of the State of Washington; I am president and general manager thereof. If I had bid personally my bid would have been for the corporation, and if I had been successful it would have been for the benefit of both myself and the corporation. There could not have been a corporation without benefiting myself, but I could not tell you whether I bid in the name of the corporation or whether I bid in the name of myself.

[Testimony of Erick Lindstrom, for Defendants.]

ERICK LINDSTROM, one of the defendants and a witness on behalf of the defendants, after being first duly sworn, testified in answer to interrogatories propounded to him by counsel for defendants, as follows:

(Interrogated by Mr. WELSH.)

My name is Erick Lindstrom. I reside at McGowan, Pacific County, Washington. I am an employee of P. J. McGowan & Sons, and my occupation

(Testimony of Erick Lindstrom.)

is that of a fisherman, having been engaged in that business with said company about nineteen years [524] and fishing on the Columbia River during all of that time; I am one of the defendants in this action; I am acquainted with the waters lying south of Sand Island and in particular with the waters south of sites numbered 2 and 3 and Site No. 1 thereof. There is an eddy there extending from the upper end of the island to what is called the great "Republic" wreck, just on the lower end of Site No. 2. Its width is different according to the tide, but I think at any time—I am sure at any time it extends out from 75 to 100 fathoms, that is 75 or 100 fathoms south of the island at extreme low tide. I think I can account for what causes this eddy to be there, the water is not very deep there, and the water forcing down, if this was an ebb tide, from Baker's Bay and upper river, is driving the water so fast into the deeper water, it backs up along this shore in shallow water and makes it whirl around and form an eddy; and the same thing with flood tide coming from the ocean, it forces the water so swiftly into deep water, in shallow water the water cannot follow this up, and it backs up and makes an eddy. There is a little bay on Site No. 2, which is a bend there, and this bend produces this effect, that the water forcing over striking that point there, runs into this bay, and of course that forms an eddy.

I know where my set nets were located in 1908. The location was planted in six feet of water, one fathom, and from 75 to 100 fathoms in the water

(Testimony of Erick Lindstrom.)

from the shore, as near as I can tell, and that was practically true with reference to the two sites of the other defendants. I placed these set nets in the water for the purpose of catching salmon fish to use for canning and freezing, that is for cold storage and salmon packing. These salmon always have had a market value and always have been very valuable fish. These set nets were all located in this eddy I speak of and on the south side of Sites 2 and 3 from the south [525] of low-water mark, extending out into the river about the length of the net that we expected to use.

The price of salmon for 1908 was five and a half cents and seven cents, I think it was—I am not positively sure. Small salmon go about five and a half and six, I think it was five and a half, and cold storage fish was seven cents, that is for fish over twenty-five pounds. The price of salmon for 1909 was about the same it was during 1908. In 1910 I think they raised the smaller salmon to six cents and the big salmon, I am pretty sure that they brought over seven cents; at any rate, I would not say a quarter or a half a cent, but they were seven cents or more. In 1911 the cannery fish, what they use for canning, was six cents and cold storage over twenty-five pounds seven cents a pound.

In the place where myself and the other defendants had our set nets and our locations, to my knowledge I know they were good places for fishing for salmon fish. This place is noted for catching more fish than any other place on the Columbia River.

(Testimony of Erick Lindstrom.)

This was away above anything that there is in the river that I know of. I have had experience in operating various kinds of fishing gear in the waters of the Columbia River. In my judgment this place was the best place for operating set nets on the Columbia River, because there is an eddy and that is just what we want for set nets. Furthermore, the fish goes into the eddy and they don't only come like they do in the channel. When they are out in the main current they keep going up—the natural nature of the salmon is to go upstream; but fish coming from the bar, it seems like they have Sand Island for a sort of a resting place, and they lay around in there for some time, and seem to go in all directions. A man there with gear fit for fishing is bound to catch fish. There is no doubt about that whatever, and that is true with reference to our set nets. **[526]**

Q. I want you to tell me where the place in the Columbia River is that is used as a general fairway and course by gill net fishermen in plying their vocation?

A. That is out where the current runs; that is what is called drift nets; they are supposed to drift, they are not supposed to go in an eddy, they are drift nets, and they lay out their nets and drift with the current. This current that I speak of is on the south side of our locations.

(Witness continuing:)

If I had not been enjoined by the injunction in this suit I would have fished my set nets for salmon fish to catch salmon and make money, that is what

(Testimony of Erick Lindstrom.)

our calculations were. I know of fish being caught in the waters south of the locations 2 and 3. I haven't been much on the island there. I saw the island and saw two hauls made by P. J. McGowan & Sons who were operating in 1907, and I was watching them make two hauls; they were operating a drag seine, and that is the only fishing I ever saw there. They got about a ton to each one of them hauls. I have not personally seen any other fish caught there, but I know from friends and parties that fished there, and from the catches that has been made there, and from the reports, it is the greatest fishing place on the Columbia River.

Q. Can you from your knowledge and experience, and from the observation that you made or saw, the two hauls there made by P. J. McGowan & Sons, give your opinion as to the number of fish you defendants would have caught each year had you been permitted to operate your set nets, that is all the nets on the two grounds?

To this question counsel for the plaintiff objected upon the ground that the witness was incompetent.

A. Picked up about 200 tons each year of salmon fish. [527]

Q. Do you know the rule, if there is any rule, as to the price paid, if any price is paid, by parties who desire to lease fishing grounds by the year, in the Columbia River? A. Yes, sir.

Q. You may state what it is.

Mr. FULTON.—I object to that as immaterial and incompetent.

(Testimony of Erick Lindstrom.)

A. I know—I have not leased any myself, but I know P. J. McGowan & Sons have leased seining grounds on the upper Columbia River, on the conditions giving one-half of the entire catch for the lease, by furnishing the lease on the ground and the gear.

Mr. FULTON.—I move to strike the witness' answer as immaterial, irrelevant and incompetent.

Mr. WELSH.—Do you know what the rule is where the party simply furnishes the location without furnishing any gear?

Mr. FULTON.—Same objection.

A. To my personal knowledge, my brother—

Q. Do you know what the rule is, yes or no?

A. I want to explain how the lease was made, which I know personally. The general rule is when they lease the ground only, that the owner of the ground has the fishing right only gets one-third of the gross catch, and the man that furnishes the gear and does the work gets the two-thirds, but on a valuable place—I know my brother was fishing an eddy and I helped him, and sometimes—that was in the year '96, he caught 83 tons of salmon in set nets. Of course, leasing the ground from P. J. McGowan he furnished his own gear—it was a valuable piece of property and fish was there, and he could catch them with a set net, and he got two cents less, on the market value, for the gross catch.

Q. What was the market value at that time?

A. They were about five and six and a half cents.

[528]

(Testimony of Erick Lindstrom.)

Q. That would be practically one-third that you paid for the use of the ground? A. Yes, sir.

Q. Is that the general market value?

Mr. FULTON.—I object to that as leading and suggestive.

(Question withdrawn.)

Q. State what the general annual market value of grounds for fishing locations, such as the defendants had, would be worth.

Mr. FULTON.—I object to that; the witness is incompetent. The testimony is irrelevant.

A. The market value, you mean with reference to our set net locations there?

Q. Yes. A. For each year?

Q. Yes. A. The price of the fish for 200 tons?

Q. One-third of the price of 200 tons of fish each year, is that what you mean? A. Yes, sir.

Q. Do you know of anything that I have forgotten, Mr. Lindstrom, that I ought to have asked you about? A. No, I don't.

Q. With reference to these different sites, known as Government sites on Sand Island, are you familiar with the waters of the Columbia River immediately joining and south of that? A. Yes, sir.

Q. With reference to Site No. 1, what can you say with reference to that, regarding whether or not it would be practical to operate a drag seine in front of it?

A. I would not tackle it myself, unless I could use part of No. 2 ground that lies in between No. 1 and the great [529] "Republic" wreck.

(Testimony of Erick Lindstrom.)

Q. Why couldn't you fish in front of Site No. 1 alone?

A. The current is laying so close to the breakers there, there would not be time or chance to get the net in with any current that would set towards the ocean, towards those breakers, it would not give the man time to get the net in before you took a chance of losing your life and your gear.

Q. Did you see the Columbia River Packers' Association operating in 1911, their drag seines?

A. I did.

Q. Where did they operate, in front of what site?

A. No. 2.

Cross-examination.

(Interrogated by Mr. FULTON.)

The Columbia River Packers' Association did not put their seines out while I was there. I did not see the seines laid out; they laid it out on Site 2 and was working there. When the net was in the water it was not in front of Site 3 at all. They laid it out on Site No. 2 and was working there. I watched them and saw them, saw that. I wanted to see the engineer, and I saw them have the net in the river in front of Site 2; where they laid it out I could not tell you, I was not there. The net was on Site No. 2 when I saw it; it was drifting down towards the "Republic" wreck. I did not see where it was put out. I saw them hauling it in.

I have been working for P. J. McGowan & Sons for the last eighteen or nineteen years, something like that. I have run seines for P. J. McGowan & Sons

(Testimony of Erick Lindstrom.)

on the upper Columbia River and lower Columbia both, foreman of the grounds. They ran on the [530] Jetty Sands in 1911; ran on the Hogsback from Tongue Point. I also seined on the Tenasillhee Island. Tenasillhee is further up the river, and we have the same back current up there and the same eddy, although it is a little eddy there. The river does not run as swiftly there as it does at Sand Island, because it has two channels there, the Cathlamet Channel and the main channel. I don't think it runs so swiftly there.

I helped put out the locations of the defendants, P. J. Coyle, myself and the engineer of the boat; the boat was McGowan's gasoline boat; we had the locations on the gasoline boat. Coyle and myself had made the locations and built the buoys, and they were placed on the boat by us and the assistance of others. At the time we made these locations and buoys Coyle and I were working for McGowan on a salary. McGowan furnished the material to make the buoys. The engineer was also working for McGowan. McGowan was not present at the time the locations were made. I never paid for the launch and I never fished either of these locations myself; neither did Coyle to my knowledge, and neither did McGowan, but we hired a couple of men from Chinook. I don't know who paid them, I did not. I don't know whether Coyle paid them or not. I don't know how long these men fished; I don't think they were fishing very long; I don't know how many fish they

(Testimony of Erick Lindstrom.)

caught and I never inquired how many fish they caught, and I never inquired how long the set nets were operated. I never heard of anybody operating a set net in front of Sand Island and I don't know whether set nets were ever tried there. I never inquired whether set nets had ever been tried there; never made any inquiry in that regard from anybody; but I think if I had been allowed to operate these set nets I would have caught 200 tons which would have been worth about $26,000. I do not think that I would have made $26,000 alone. I am basing my [531] estimate upon the theory that I had the exclusive right to all of Sites 2 and 3 and to all of the waters in front of them. My idea was to operate the set nets not over 75 fathoms long, but I do not know how long the set nets were that were operated by the men I employed. I do not know where the men that I employed got their nets; they had the gear there on hand; I suppose they got them there. I must have been busy at something else at that time. The reason I did not inquire how much fish I caught there was that the locations were there and these men were hired for looking after these locations more than for fishing. We did not intend to start that soon, that early, for the reason that the ground on Sand Island is better fishing the latter part of June, July and August. There are more fish at that time because the waters get clear, but that is not the only reason. We cannot catch fish in muddy water in the set nets, they are the same as gill nets;

(Testimony of Erick Lindstrom.)

but it is better for gill net fishing in muddy water in daylight.

Redirect Examination.

(Interrogated by Mr. WELSH.)

It has been proved that our fish nets and locations were taken out by the Columbia River Packers' Association. I could not say whether they drove our men away that we had watching. I know that they came back to the cannery after some more buoys, that is to replace the ones that were taken away. They were up there for some more anchors and buoys to place in the place of those taken away. I didn't go down with them to plant them. [532]

Recross-examination.

(Interrogated by Mr. FULTON.)

The locations were taken away before we were ready to fish. They were not fishing from May the first—I don't know just exactly when we put the locations in there. I don't know how much fishing they did there.

Q. You had men there fishing from the first of May up until the time the plaintiff took the buoys out? A. The men were there.

Q. You put these buoys in the first of May, 1908?

A. I cannot remember just when we put them in.

Q. It was early in the first of the fishing season?

A. I could not remember who put the locations down there, but they were in the fishing season.

Q. It was in the fishing season, was it?

A. Yes, sir.

(Testimony of Erick Lindstrom.)

Q. How does it happen that you can remember anything in your favor, but when I question you your memory is awfully bad?

A. It ain't so worse.

Q. It might be worse, I admit, but do you remember if you put any locations in there?

A. I remember that.

Q. Was it in the month of April or February?

A. It was somewheres in the latter part of May, I guess.

Q. Latter part of May; the fishing season opens when? A. Opens the first of May.

Q. The 1st of May. Then you didn't put them in the 1st of May?

A. I cannot just remember; I told you that I cannot remember when we put them in there.

Q. But you did put them in there in the month of May? A. I am pretty sure it was in May. [533]

Q. The testimony shows they were taken out the 21st of June, 1908? A. Yes, sir.

Q. These men you had fishing were fishing from the 1st of May, sometime during the month of May, up to the 21st of June, didn't they?

A. I don't think they did; they wasn't hired to look after that.

Q. Didn't you swear not five minutes ago that you hired the men to fish these nets? A. Not in May.

Q. When did you hire them?

A. They were there before they started to seine.

Q. When did you hire these men—you sit there

(Testimony of Erick Lindstrom.)

and tell me you don't know when you hired these men to operate your set net?

A. I didn't hire them myself.

Q. You swore awhile ago that you did.

A. No, I didn't.

Q. You did not? **A. No.**

Q. All right. You say now you did not testify awhile ago that you hired, or "we" hired some men?

A. "We" did.

Q. That is you?

A. We all three were in company.

Q. You knew they were hired? A. Yes, sir.

Q. Sure you did. You hired them, didn't you?

A. Yes; well, that is "we."

Q. You said one time you did not hire them, and another time you said "we" did.

A. We did. **[534]**

Q. You were one of the three that hired them?

A. Yes, sir.

Q. You knew they were hired? A. Yes, sir.

Q. When was it they were hired?

A. My recollection, which is not so bad, is that I think it was in May or June, somewheres around there. They were not there from the time the buoys were planted there. They were only there a few days; what days that was I cannot just recollect.

Q. You do not want to remember very well, do you?

Mr. WELSH.—I object to the question, it is not fair.

(Testimony of Erick Lindstrom.)

Mr. FULTON.—Q. I say, you do not want to remember?

A. Well, I cannot remember when those men were there.

Q. You have no idea?

A. They were there before the buoys were taken away from there.

Q. Nobody asked you that; do you remember how long they were there—you hired them, didn't you?

A. The men were there; I don't think they were there over a week.

Q. You do not think they were there over a week?

A. I don't think so.

Q. Still you think you hired them some time in the month of May?

A. (Hesitating.) Well, I have said now, again, that I don't remember whether it was in the month of May or the month of June, I cannot remember that; I didn't put those things down and I cannot remember. [535]

Redirect Examination.

(Interrogated by Mr. WELSH.)

The only thing that I know the men came back there and told us the buoys were taken out, some of them, I don't know how many. They came back for more material to put in new ones. They did not tell me who took them out, but their opinion was the same as others testifying, that the Columbia River Packers' Association took them out. I don't know whether the Columbia River Packers' Association

(Testimony of Erick Lindstrom.)

made any threats about killing anybody that attempted to operate these nets. I don't know whether there was any general rumor with reference to that.

Thereupon the defendants rested.

The plaintiff thereupon called the following witness on its behalf:

[Testimony of W. A. Latourell, for Plaintiff.]

W. A. LATOURELL, a witness on behalf of the plaintiff, after being first duly sworn, testified in answer to interrogatories propounded to him by counsel for the plaintiff as follows, to wit:

(Interrogated by Mr. FULTON.)

I live at Troutdale in the State of Oregon; I have lived around Troutdale about forty years; all my life. I am forty-one years of age. My business is that of a fisherman; I set net and drift both, in the waters of the Columbia River. I have been engaged in that vocation about twenty-five years, ever since I was large enough to row a boat, both in operating gill [536] nets and set nets in the Columbia River. A set net is made of the same material and in identically the same manner as a gill net. Different size mesh are sometimes employed and different size twine but this is also true of set nets. The fish are taken by set nets only by being gilled therein, and it is not used as a drag seine and is employed at a fixed point; it is stationary. You have to have an eddy to set them in, where the eddy meets the current; where the current comes around some point and

(Testimony of W. A. Latourell.)

the eddy back flows. You set your net between the current and the eddy—between the two waters where the outside current comes around and your eddy comes back and you set the net in between them. That is about the only place you can hold them; probably you could set them down further in the eddy. The object of this is, you could not get anything to hold the net, you could not hardly put enough anchors on, and in the next place you would not take the fish; if it did, the first would be taken right out of the lines. A set net must hang loose, and if a set net is placed in the current or any place where the meshes are drawn taut, it will not take fish. It must be in a place where it hangs just normally to catch fish; if it is drawn too tight it won't take them. In order to catch by set nets you must have muddy water to catch them in the daytime, but at night-time you can catch them in clear water. The reason for this is, the fish see the net and don't go into it, and a set net will not catch any fish in the daytime in clear water.

If I am not mistaken, I think the waters clear up in the Columbia River about the tenth of July, so that from that on we don't get anything in the daytime. I am the owner of a set net location and I don't know of but one better location than mine on the Columbia River; that one is called the "Butler Eddy" and is operated by the McGowans. I lease most of my eddies. I have two eddies that I pay $75 per annum for; the other one, I don't [537] know who it belongs to, I just use it. I think I have

(Testimony of W. A. Latourell.)

as good a set net location as there is on the Columbia River, with the exception of the one at Butler eddy, and I have been operating my set net locations off and on for twenty years, I guess—yes, twenty-five years. I operate one set net in each eddy.

I have been down to Sand Island and I examined it for the purpose of ascertaining whether or not set nets could be successfully operated there, but I did not give it any consideration or examination, I just looked it over for the purpose of ascertaining whether or not set nets could be operated there successfully. From my knowledge and experience as a set net operator I do not think there could be any fish caught there in a set net, for the reason that the tide is too swift. From my experience, you take water where it is running from—well, you might get fish in water running two miles an hour, but I don't think you could catch them hardly in that, and where the water runs anything over that, you don't have any success in fishing. I don't think set nets could be operated in front of Sand Island because the tide would be too swift; it would draw the net too swift and the meshes would draw up; and another thing, I don't believe you could hold a net there with the current they have there; and you take where the water is running so swift, if a fish strikes the net it would be drawed so he would not gill anyhow, and so I don't believe, in my estimation, they could catch a fish there. I do not think they could catch any fish if the net were sitting parallel with the current. I never tried mine that way and I don't see how they

(Testimony of W. A. Latourell.)

could. I saw no eddy such as could be used for set net purposes in front of Sand Island. It looked just like a straight beach to me; there were no points where the water swirls around. The beach is practically straight, but there might be a little alcove, but not to amount to anything; it is practically a **[538]** straight beach. When I was there it was flood tide.

In my judgment, the waters in front of the south shore of Sand Island would not be worth anything for set net purposes.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I have done all of my fishing on the Columbia River and Sandy River. My experience has been confined to drift nets and set nets. I never operated a fish trap; I have been on different drifts with drift nets, but all set netting was in the same place. I do not know how many set nets I have operated, that would be mighty hard to tell, but I have operated a good many. I have fished three of a season, then I have done some winter fishing. My operations were thirty miles above Portland on the Columbia River. I do not know how far that is from Sand Island. I have never fished in the neighborhood of Sand Island, but I have been there several times and on the island once. I was there last Thursday of last week; that was the first time I was ever on the island; that was the time I made the examination I spoke of in my direct examination. I went there at the request of the plaintiff to look at it; we were

(Testimony of W. A. Latourell.)

on the island about three hours, I guess, and the tide was flooding. It was ebb tide when we first went there, and flooding when I came away. I was opposite the great "Republic" wreck; I was on the shore. We ran down outside of the island and landed on the beach. I simply stood on the shore and looked out over the waters and studied the conditions from the shore. I know nothing of Sites 1, 2 and 3 on Sand Island excepting what I was told. When I was standing there watching the waters, I think, if I remember right, it was on Site No. 2, but I could **[539]** not tell you what part. It was right in front of the old wreck and during the three hour period that I was standing there I made up my mind that a set net could not be operated in those waters. I was enabled during that time to tell the action of the waters at all times at that place. I mean to say that on the south side of Sand Island there is a kind of a bay at the upper end and that is away above where we were. I don't think that the south side of Sand Island is of crescent shape; but I would call it a straight shore; there might be a little angle, but if there is it is very little. I meant to be understood as saying that there was no eddies in the waters in front of the island while I was there. I do not know how often the tide ebbs and flows in a day. I never fished on Sand Island and have had no experience in tidal waters. All I know about it is the way the river runs, the tide just seemed to come in and go out, and that is all there is to it. I have fished for twenty-five years, yet I

(Testimony of W. A. Latourell.)

do not know how often the tide ebbs and flows in twenty-four hours. You can tell from the shore whether there was an eddy in front of the island; I would not have to take a boat or go out to see. I think by standing there three hours I could determine with certainty whether or not there was an eddy in front of such island. It is simply a straight current flowing back and ebbing out. I could not tell you what the conditions would have been when the tide was flowing out at its highest. I saw that a set net could not be operated in those waters because the current is too swift for it. I doubt whether you could hold a net there or not. You could anchor it so you could hold it if you had strong enough weights, but in the next place in a swift current it would not take fish, because it draws the meshes of your net too close together they will not catch and draws them so tight they will not gill. If we had a net here we could see that. Take **[540]** a lead line here and a cork line here, it is bound to draw the meshes, stretches them out, closes the meshes up. In an eddy there is a whirling condition of the water but not where we fish. We set our net at the dividing of the current and the eddy, where the two currents meet, that is where we put our net. You don't have to have an anchor outside of the net. We tie it in the inside and it will lay out right there. I have never fished in tide water and I know nothing about it. You could not set your net with the current, you have to set the net between the current and the eddy; that is the only place you can handle

(Testimony of W. A. Latourell.)

a set net with any success, and if there is any such place on Sand Island the net can be operated there, but I did not see any while I was there. I have tried to operate a set net where there was a current. I have tried to force them, put the entire net out in the current, but I didn't have no success with it. It would draw the inside so tight the net would not fish any place, and I would have to take it up again. That was in the current above tide water. In set net fishing in the upper Columbia we cannot fish in clear water in daytime, but as quick as it gets dark we catch them. We only get about five hours fishing a certain part of the summer—about six hours. It gets light after three o'clock; after three o'clock you might as well go in, can't catch a fish. I do not know anything about the condition of the water at Sand Island as to its being clear or muddy. It might be a perfectly good location for set nets, but if it is I did not see it. When I was there they could not put a set net in.

The set net location that I leased belongs to the Gordon Falls Water Power Company. Thomas F. Ryan of Oregon City is president, and I pay him $75 per annum for the two eddies. During the year 1911 I got only about three tons of fish, it was a poor year. During the year 1910 I think I [541] caught between nine and ten tons. I don't remember what I did get the year before that. I don't know anything about the number of fish at Sand Island. I never tried setting a net parallel with the current. I do not think it would work successfully.

(Testimony of W. A. Latourell.)

If you catch a fish the minute it draws on the end your fish is gone. If your mesh are too large the fish won't gill, and you cannot catch a fish with the net straight up and down the river; you would not get one fish.

I am not in the employ of the plaintiff and never have been. The plaintiff did not pay me for going there to make this examination. I simply went down. A friend of mine was running the cannery and he wanted me to go down with him. I went down at the request of Mr. Reed, an employee of the plaintiff. He told me he wanted me to go down there to look at the ground so I could be a witness in this case.

One of my set nets is about two miles above Bridal Veil Falls on the south side of the river, and the other one is about two miles above that. [542]

[Testimony of H. R. Reed, for Plaintiff.]

H. R. REED, a witness on behalf of the plaintiff, after being duly sworn, testified in response to interrogatories propounded to him by counsel for plaintiff as follows, to wit:

(Interrogated by Mr. FULTON.)

My name is H. R. Reed. I am at the present time running a cannery for the Columbia River Packers' Association at Rooster Rock, in Multnomah County, State of Oregon, and am manager of the cannery for the Columbia River Packers' Association at that point. I have been such manager for about 12 years. I have followed the fishing business for

(Testimony of H. R. Reed.)

about 10 or 12 years, something like that, some set netting and gill netting. I have given these matters my consideration at that time, at least I thought I did, anyway. I have had experience in operating set nets and observing the manner of their operation, off and on for 10 years. I would not be positive as to the time. My experience has been confined to the upper Columbia River. The character of water necessary in which to operate a set net is what is known as an eddy. That is a dividing line, where the two currents come together, that is an eddy; the current on that division line would be where we would set out nets. These eddies are formed generally by a point or something projecting from the shore and thus forms an eddy. We get on the dividing line between the two currents. A gill net and a set net are identical so far as their construction is concerned, and the only way that a set net can catch fish is by gilling them, and they are only used that way, and are entirely dissimilar from a drag seine. In the operation of a set net, it ought to hang slack. If you put a strain on it, it won't fish, for when a strain is put on the net the net meshes will close together and it would be like a plank in water; fish would run against it but there would be no chance of them getting caught. If a fish were gilled in [543] a set net and the set net was in a swift current, they would pull the fish out. I have been on Sand Island, and I have examined the waters in front of Sand Island on the south shore. I would not con-

(Testimony of H. R. Reed.)

sider the beach in the form of a crescent; I would consider it a straight line.

Q. State in your opinion whether or not there is any point south of Sand Island suitable for set net purposes, or that a set net could be used there.

To this question, counsel for defendants objected on the ground that the witness has not shown himself competent.

A. It don't look favorable to me. There is altogether too much current there; no eddy that I could see. I was all along the island and in the waters in front of it, too. Set nets will only catch fish during muddy water, but not daytime, but at nights. It must either be dark or muddy water in order to catch fish in a set net. The seasons in which the Columbia River, that is the upper Columbia River, is clear is generally the latter parts of the season, in July—the latter part of July and August, and during that time a set net can be operated successfully in the night-time only.

Q. What, in your judgment, Mr. Reed, would be the value of the use of the waters in front of Sand Island on the south side, per annum, for set net purposes?

To this question, counsel for defendants objected for the reason that the witness has not shown himself to be competent to give an opinion.

A. Why, there is no value at all.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I am in the employ of the plaintiff company, and

(Testimony of H. R. Reed.)

manager of one of its canneries. The cannery is located at Rooster Rock, in Multnomah County, State of Oregon, a point that is called the upper **[544]** Columbia River. I do not know just exactly what they do consider the dividing line, I have always heard it called upper and lower river, and I don't know what the object is. I don't know where they quit calling it the upper river and call it the lower river; probably, the mouth of the Willamette, I am not sure. My fishing operations have been on the upper river. Sand Island is on the lower river. I would not say, but it may be possible that the upper river is so called because it is above the flow of tide water. For the last 12 years, my work has been in the cannery. Before that, I fished 10 or 12 years, off and on, but not steady. I was fishing for P. J. McGowan & Sons up in that country, both gill netting and seining, set net and wheel fishing, in fact all kinds of fishing. I do not remember how many set nets I operated. I must have set netted for four or five years steady. In my judgment, you must have an eddy for a set net, and that the mesh must hang slack in the water. I think most assuredly that the current will pull the fish out of the net if the net is drawn with the current, if the current is strong enough. Fish are not always traveling with the current. I have always understood they ran up and down. They do not go with the tide, although I don't know as to the tide water, I never fished there.

Q. If it is true that fish in the tide waters run

with the tide, and if the net is drawn by the action of the current and the fish are caught by their gills in the meshes of the net, why will not the action of the current drive the fish into the mesh rather than pull him out of it?

A. If they are traveling with the current?

Q. Yes, traveling the same way the net is drawn.

A. I don't know that the net is drawn that way. The tide is different from the current, I don't understand this tide business, the directions the fish run.

[545]

Q. The tide is a flowing of the water?

A. Yes, but I don't know which course the fish are following.

Q. Suppose they do follow with the flowing of the tide. If that is the method of running, and if the net is drawn with the current, and the fish as he goes is caught in the meshes of the net, then will not the force of the current drive him into it rather than pull him out of it?

A. It might have a tendency to drive him clear through or cut the meshes and let the fish out entirely.

Q. He would be tangled up in the net so he would not be likely to get out.

A. I never saw them tangled that bad, they generally break out. I never had any success set netting in swift current; I could not say as to the tide.

Q. How many times have you been on Sand Island?

(Testimony of H. R. Reed.)

A. Never on the island but once; passed there two or three times.

Q. When were you on the island?

A. About a week ago, I think.

Q. What day?

A. It was on Thursday, I believe.

Q. Thursday of last week?

A. Thursday of last week, I think that is the day; I would not be positive.

Q. I wish you would locate the day.

A. It was Friday.

Q. Friday, the 19th of April? A. Yes, sir.

Q. How did you happen to go there?

A. I went there with other parties, Mr. George was along. I went there for the purpose—

Q. Mr. who?

A. Mr. George. (Continuing:) —looking over the ground to see if I could find a suitable place for a set net. **[546]**

Q. Mr. George asked you to go? A. Certainly.

Q. What did you do when you got there?

A. We looked over the ground, looking for a suitable place for a net; I was not able to find one.

Q. What ground?

A. South side of Sand Island.

Q. Where were you standing when you looked it over? A. Along the beach, south side end.

Q. What time of the day were you there?

A. We left Astoria I think about eight o'clock in the morning, if I remember, and I imagine it must

(Testimony of H. R. Reed.)

have took about an hour to run over there, and we left there—

Q. You think you got there about nine o'clock?

A. I imagine so.

Q. What time did you leave?

A. It must have been about twelve, maybe one, half past twelve probably.

Q. You were there about three hours then?

A. Yes, something like that, maybe a little over three hours.

Q. What was the condition of the tide?

A. The tide?

Q. Yes.

A. It was coming in when we were on the shore.

Q. Coming in when you first got there?

A. No, the tide was out then. We were in the launch running along the shore, in the launch. When we got on the shore the tide was coming in.

Q. You went down in a launch in the first place?

A. Yes, sir.

Q. Where did you start in with the launch?

A. Started in at Astoria. **[547]**

Q. I mean the launch when you went down the shore.

A. Started in at the head of the island.

Q. East end? A. Yes, sir, east end.

Q. You went clear to the east end, did you?

A. Yes, sir.

Q. How far south did you go?

A. Went clear down as far as I wanted to go, down as far as the breakers. I don't know what place they

(Testimony of H. R. Reed.)

call it, below the "Republic" wreck.

Q. You went down below that? A. Yes, sir.

Q. How near the shore were you?

A. Well, I don't know what the distance, we was four or five hundred feet, I should imagine, three hundred feet, it would vary.

Q. When going down or coming back?

A. Both.

Q. How far were you from the main current of the river? A. From the main current?

Q. Yes.

A. I thought we was in it, I don't know. It seems to me it was strong enough where we was.

Q. You do not know where the main channel of the river is?

A. I know where the big boats were running, away out, I don't know how far it was.

Q. How far were you from that?

A. I don't know how far it was, long ways to where the ships run.

Q. You went down the island there just as the tide was finishing its ebb, did you not—the last of the outgoing tide? A. Yes, I imagine so. [548]

Q. From what you saw there—have you ever studied the action of the tides there, or anywhere else?

A. No.

Q. You are entirely unfamiliar with tidal action?

A. Yes, sir.

Q. Then you do not know whether with the flood or the highest of the ebb tide, whether or not the waters would sweep around the upper end of Sand

(Testimony of H. R. Reed.)

Island, and out towards the main current or channel of the river. You do not know anything about that, do you? A. Sweep around the—

Q. Sweep around the end, around through Baker's Bay and around the end of the island and be thrown out to the current of the river in the center of the ship channel?

A. I didn't notice it was doing it that day.

Q. You saw the tide when last going out?

A. Yes, sir, and when coming in.

Q. When the water is coming with a great rush with the ebb of the tide, if it should rush around the end of the island and strike out diagonally towards the center or main channel of the river, and then be thrown back towards the shore of the river, you do not know anything about that?

A. I know I did not see anything like that when I was there during that time.

Q. If you had been there when the flood of the ebb tide, so to speak, was on, and if you had seen the water making that kind of course, and then bound back to the shore and then back again, wouldn't that have created an eddy or number of eddies over that surface between the main current and the shore?

A. I could not say it would.

Q. What would it have done?

A. Simply straight course from up the river alongside the island.

Q. What you saw was a straight course? [549]

A. Yes, sir.

Q. It was the last flood of the tide next to the shore?

(Testimony of H. R. Reed.)

A. I could not understand that there would be any difference between the first and the last.

Q. You do not think there would be any difference?

A. No, I could not say there was.

Q. So far as you know you think the last flood of the tide would be just as swift and strong as the last ebb?

A. Possibly not as swift, but I saw nothing much, the direction of the run of it.

Q. Wouldn't the great volume of water rushing around the end of the island—what would be the effect of that, would it immediately turn and run straight down the shore, or would it be pushed out across here?

A. I think it would run down the shore.

Q. You think it would swirl around and follow the shore? A. Yes, sir.

Q. So you think it would flow around the corner of the island with a great speed and that it would immediately turn and follow parallel with the shore?

A. That is my notion of that place.

Q. You say the shore of Sand Island is straight?

A. Yes, it looks straight to me, perfectly straight. There might have been a little bend over there on the east end, there was one little bend, if I remember right, small bend.

Q. Are there any little bays on the south side of the shore?

A. None that I could see; almost a straight beach.

Q. Now, if you were to draw a line from the easterly end of the shore, to the westerly end of the shore,

(Testimony of H. R. Reed.)

you would keep practically along the beach, would you, all the way down?

A. Excepting along a little bit of point that sticks out, I don't know just how far it was from the east end, but not a great distance; there is a small point extends out there. [550]

Q. You say there was no indentations—no crescent form to the south side of the island at all?

A. It didn't look so to me; might be a little crook in it, but nothing to amount to anything.

Q. That is the only time you were ever ashore?

A. That is the only time I was ever on the island.

Q. Now, you think that you saw no eddy there?

A. I know I saw none.

Q. You know that you saw none?

A. I saw no eddies.

Q. You are not able to say if you had sat there for twenty-four hours watching the action of the tide, whether you would have seen eddies or not?

A. I see no reason why I would; I never seen them. The tide would have run one way or the other and have run the same way—

Q. If you know nothing about the action of the tide, how do you know you would not have seen a change in the condition?

A. I never knew it to run crossways of the river; either runs up or down.

Q. You know something about the flowing of water, don't you? A. Yes, sir.

Q. Don't you know if the water strikes the shore in a certain way it may be wrecked and be thrown

(Testimony of H. R. Reed.)

back? A. In some places.

Q. How often does the tide ebb and flood?

A. Twice a day, I suppose.

Q. Twice in 24 hours?

A. I think so, I believe that is the idea.

Q. What do you know about that?

A. That is the way I understand it. I said I didn't know but very little about tides.

Q. You have never watched them? A. No, sir.

[551]

Q. That being tidal location, and this being tidal waters, and you never have operated in tide waters, and never have been there before except during the three hours that you were there on shore, do you now undertake as an expert to testify here that there is no eddy in those waters and never is?

A. I say I could not see any.

Q. You say you did not see any during those three hours?

A. I saw no eddy or any chance where I thought there could be an eddy.

Q. The water was comparatively quiet at that time?

A. That is for the tide running in and out?

Q. The water was comparatively quiet, wasn't it?

A. It was swift, it was coming in.

Q. What do you call swift?

A. I call anything you could not set net in, for instance running three or four miles an hour; I call that all swift water.

Q. That is, the water was running three or four

(Testimony of H. R. Reed.)

miles an hour? A. Yes, I think so.

Q. Right at the shores?

A. I would not say that.

Q. You stayed there until flood tide again?

A. Yes, sir.

Q. Did it run three or four miles an hour then?

A. I don't know, I imagine it was running that way.

Q. Now, wasn't there a time when there was practically no current either way?

A. A short time, possibly.

Q. Do you know?

A. Well, I have always understood there was a slight—

Q. You were there, weren't you, then?

A. I might not have noticed it exactly. It was not standing perfectly still, but I presume at one time it stands still a [552] few minutes.

Q. The truth is, Mr. Reed, you were taken over there by Mr. George, the president of the company that employs you? A. Yes, sir.

Q. For the purpose of looking at that situation in order to come here and testify?

A. I suppose so.

Q. They told you so, didn't they? A. Yes, sir.

Q. They told you that is what they wanted you to do? A. Yes, sir.

Q. They took you from the upper river, a man who never had any experience in tide waters, had never seen Sand Island before? A. Yes, sir.

Q. And asked you to go there and stand there for

(Testimony of H. R. Reed.)

three hours and then come here and give your opinion that a set net could not be operated there?

A. They wanted to know how that compared with set net locations I had seen.

Q. That is, on the upper river?

A. On the upper river; and if I could see any places that looked favorable for set net purposes.

Q. You could not see any?

A. No, sir, I could not.

Q. You were present with Mr. George during the time you were looking at it?

A. Some of the time.

Q. And you were with Mr. Reed also—who was the other man—Mr. Latourelle? A. Part of the time.

Q. That was your purpose there? A. Yes, sir.

[553]

Q. To look at it and see whether you could testify in your opinion that there would be no eddies there in which you could operate set nets? A. Yes, sir.

Q. Now, isn't it a fact, Mr. Reed, that you were looking at that matter largely through the eyes of your employer? A. No, sir.

Q. That is what you were there for, wasn't it?

A. What is that?

Q. You were there for that purpose?

A. I was there looking for it, through his instructions, to look over the ground, to see for myself, and I was not influenced by him or any other man.

Q. You were there at the request of your employer?

A. Certainly, it was at the request of him.

(Testimony of H. R. Reed.)

Q. You say a set net must be operated in muddy water?

A. Yes, or dark water—during the night is all right in clear water.

Q. What do you mean by dark water?

A. You could not operate a set net in daytime in clear water with any success.

Q. Do the fish see at night?

A. I don't know; I don't think they can see as well as they can in the daytime.

Q. You can catch them in clear water at night?

A. Yes, sir.

Q. What was the condition of the water in front of Sand Island as to being muddy or clear?

A. When I was there?

Q. Yes. A. It was muddy.

Q. Then it would be good water for a set net?

A. Yes, the water was all right. [554]

Q. Did it look as swift—you say you saw no eddies there?

A. Yes, I could not see any place for a set net; the water was all right so far as the clearness or muddiness was concerned.

Q. Now, to be perfectly fair, Mr. Reed, don't you think if you were to stay there for a period of 24 hours and watch that water during the whole 24 hours' period, or stay there for a week or a month, that you would be better able to tell the condition there than you are now?

A. No, I don't think that I would.

Q. You do not think you would? A. No, sir.

(Testimony of H. R. Reed.)

Q. You think three hours was enough?

A. I don't think the current or tide would run any different if I had stayed there for 20 years, that would run just the same there, up and down the river.

Q. If you were there for 20 years you would not know any more about it than you could watching it as the tide was going out and as it was coming in?

A. I know it would certainly run the same direction unless Sand Island changed or went away, because it would not run different.

Q. When were you fishing with the set nets of which you spoke?

A. In what is called Butler's eddy.

Q. When, I say.

A. Let's see, about '88, I think, or '89, somewheres around there; I don't remember just the time I started.

Q. What is your age? A. My age is 42.

Q. 1888 was 24 years ago?

A. Yes; I have been fishing ever since I was 11 years old.

Q. Where were those nets?

A. They were right there near McGowan's Cannery on the upper river, right near the cannery.

Q. In Washington or Oregon? [555]

A. No, the first net I ever fished was in Oregon when I was 11 or 12 years old.

Q. When did you quit fishing with set nets?

A. When?

Q. Yes. A. Along 1906, I think—'96.

(Testimony of H. R. Reed.)

Q. You were fishing in Oregon or Washington?

A. The last fishing I done was in Washington, set netting.

Q. 1896 was the last year you fished with set nets?

A. I think so.

Q. Sixteen years ago? A. Yes, sir.

Q. That was on the upper river? A. Yes, sir.

Q. And you never fished at any other time in tide water? A. No, sir.

(Witness excused.)

Mr. HADLEY.—We now move to strike out the testimony of this witness, and the former witness, the entire testimony, for the reason that they are both shown to have had no experience in fishing in tide waters, or in the operation of set nets in tide waters, and at such locations as this on Sand Island; that both are entirely unfamiliar with the action of tide waters, and therefore incompetent to give an opinion as to the conditions at Sand Island.

Mr. FULTON.—We resist that motion. If it prevails, we will insist that the testimony of all the witnesses called by the defendants in this case, who never operated in front of Sand Island, be also stricken out by the same logic. [556]

[Testimony of R. A. Hawkins, for Plaintiff.]

R. A. HAWKINS, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

(Interrogated by Mr. FULTON.)

I heard Mr. McGowan when he testified that the south side of Sand Island is in the shape of a crescent. This is not so. The shape is comparatively

(Testimony of R. A. Hawkins.)

shown on Exhibit "F." It is just like the lines as shown on that exhibit. The south shore is practically straight. This map, Defendants' Exhibit "F" shows practically the line of the shore as it is and has been for the last five or six years, something like that. I am familiar with Sand Island. I have known it for about 20 years—25 years; I am familiar with gill netting and set netting. Within my knowledge, there has never been a set net operated south of Sand Island. The character of water necessary in order to catch fish in set nets is, I should judge, you would have to have slack water, and the water would have to be muddy. Some years, the water in the Columbia River is clear from around the 25th of June and some years to the 1st of July, and from then to the 10th, as a rule. It differs according to the freshet in the Columbia River. From May 1st up until about the 25th of June, the waters in and around Sand Island are generally muddy, as a rule, and is best suited and adapted for set net fishing, if possible. In order to operate a set net successfully, you have to have practically still water, I should judge what little experience I have had. There is no point in front of Sites 2 and 3 where such condition exists. It is impossible to fish with a set net in that locality. I heard the testimony of Mr. McGowan when he gave his theory of the waters rushing in from Baker's Bay around, crossing the main ship channel of the Columbia River. The facts, as I understand them, are, namely: Well, the first of the flood comes, it [557] comes gradually, it comes right up that

beach, it gradually increases, flooding about,—I should judge, about an hour before high water. Then after high water she turns and roars out, comes right down the beach; it is impossible for us to seine on top of high water, or even half tide at certain times, because we lose our seines; they would be swept out to sea. The current on full tides runs stronger; on neap tides not so strong. Take the average speed of the current, it must go five or six miles an hour past Sand Island, and, in my opinion, a set net could not exist there at all. The corks would all either be under or your under line would be on top of the water if it was not rocked heavy enough down, and if it was rocked heavy enough down it would zigzag, and it would be impossible to gill any fish. It has been tried there by McGowan's men; they were there three or four days with one and could not catch a fish.

Now, in regard to Site No. 1, I consider it as good ground as there is on Sand Island, taking it different years—the average years. It is not a very large ground, that is, it is not a very large fishing place, but they fish it with small seines. I have had considerable experience there. Hanson and Olson had that ground in 1908, 1909 and 1910, and during those years there was one year there I think they put in 30 or 40 per cent more than No. 2 and 3 put in.

Q. In operating it did the operators use the ground of Sites 2 and 3?

A. Well, there is a little piece of No. 2 extends from the "Republic" down to No. 1, but I had con-

(Testimony of R. A. Hawkins.)

siderable experience there. We got Mr. Hanson and Olson, they wanted to give Mr. McGowan some of their fish one day and I would not stand for it, so I told them they could not fish that part of the ground if they were going to give their fish away. So he said, all right, he was going to do it, and he left own ground and fished his own ground, but he got just as many, if [558] not more; he shortened his seine, and I think he improved. So I went down and told Hanson there was no use of him and I having any racket; he could fish the ground and if he did not give us his fish he could not trespass on our grounds, use our force or scows, and we compromised. He said he did not care whether he fished our grounds or not, that he was doing just as well. That is the way that turned up. He started his seine from at Site No. 1, and landed them on Site No. 1, and he continued doing this for over a week, and during that time he did as well, if not a little better than he did before. He was very independent about it, didn't care whether he went back on No. 2 or not.

Q. Now, do you know how the catch of salmon with a set net on a given location compared with the drag seine on the same location, and where each could be used, where it is possible to use either one on the same location, how is the comparative catch?

A. There is none; there is no comparison.

Q. You heard Mr. McGowan state in his judgment set nets would catch about 70% of what—

A. They would not catch seven, they would not catch two per cent; in fact they would not catch

(Testimony of R. A. Hawkins.)

any fish, and Mr. McGowan knows it as well as anyone.

Q. Did you ever know of anyone operating a set net with the current? A. With the current?

Q. Yes. A. No, sir, I never heard of it before.

Q. What effect would the current of the river in front of Sand Island have on the set net if it were anchored with the current?

A. Well, it would—in my estimation it would put it just end on—it would close the meshes and take it right upstream. **[559]**

Q. In that condition would the net catch any fish?

A. Impossible.

Q. How about gill netters using that ground out there where these set nets were supposed to be?

A. They use it just the same as we do, turn-about.

Q. How many comes down the river?

A. Certain parts of the year they come whenever they see us catching a few fish, they come in there and watch us, and when we catch a ton of fish or so they come on the beach and throw their net on the boat and pull out.

Q. State whether or not in your judgment these buoys that Mr. McGowan and his employees placed on this ground could be maintained there any appreciable length of time.

Mr. HADLEY.—That is objected to as immaterial to the issue now being heard.

A. They could not be maintained at all. When we went over on the island the first year they put them in there, they were scattered for miles before

(Testimony of R. A. Hawkins.)

we got there. We were accused of taking them out, which was not so. The gill netters plied from one place to another, some way below the "Republic" and some way up to the west end of Sand Island where the gill netters had dragged them up.

Q. During the time the water is clear in the Columbia River, which you say occurs after June 25th, when do the gill netters generally operate, mostly?

A. They operate mostly night-time; that is, when the water is clear; they fish a good deal at night-time, but whenever there is any fish around they pick up one or two salmon, whether clear or not. They come in on Sand Island and they lay there inside the "Republic" by the hundreds, and just as soon as they get an opportunity and see a few fish, they run right in on the beach, they come and throw their net out **[560]** and drift up or down, according to the tide. There is a very few drift two hours after flood tide, because they have to stop, and we have to stop, on account of the tide, it is too strong a current. We very seldom fish for two or two and a half hours after flood tide. We very seldom fish on the first of the ebb. We have to wait two or three hours after the first of the ebb.

Q. You say the fishermen—the gill netters snagged the buoys McGowan put out?

A. Yes, they pulled them all over.

Q. Were there any objections made to them by fishermen? A. Yes, lots of them.

Mr. WELSH.—We object to that and move to strike it out as immaterial.

(Testimony of R. A. Hawkins.)

Mr. FULTON.—Q. Now, were you down on Sand Island at the time Mr. Latourelle and Mr. Reed were, who were witnesses here? A. Yes, sir.

Q. Did you notice the condition of the water and the current in front of Sand Island and that vicinity at the time they were there? A. Yes, sir.

Q. Is there any change in the current and conditions of the current of the waters in front thereof any time during the fishing season, than what it was at that time as to the current being different—the condition of the waters being favorable or unfavorable for set nets?

A. The only difference is on full moon tide and neap tide. On full moon tides the tide run—in fact, on full moon tides there is probably a week, around a week, in full moon tides, we don't catch fish enough to supply the camp; we have to quit fishing. We do not quit exactly, we go out and try to catch a few; lots of times we never catch a half a ton. [561]

Q. Assume, Mr. Hawkins, Mr. Latourelle should have stood on that beach for 24 hours, would the conditions in front there have changed from what it was during the time they were there?

A. No, sir, they could not have changed any, the tide just floods in and ebbs out, there is all there is to it.

Q. They would not have received any different information had they stayed there for 20 years?

A. No, sir.

Mr. WELSH.—I object to that as leading and calling for a conclusion.

(Testimony of R. A. Hawkins.)

Mr. FULTON.—I will withdraw that.

Q. State whether or not the conditions that then existed and were shown to the witnesses Latourelle and Reed would have changed any had they remained there over several or more tides?

Mr. WELSH.—That is objected to as leading and calling for a conclusion of the witness, and invading the province of the Court.

A. I think if they had stayed there until the first of the ebb that they would have went away disgusted entirely, because the first of the ebb comes down there pretty strong, right through there, and if they had waited an hour longer they would have seen a strong flood tide.

Q. Would there have been any more favorable conditions developed for the operation of the set nets?

Mr. WELSH.—Same objection.

A. No, I think not.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I live at Ilwaco; I am superintendent of the Columbia River Packers' Association on the Washington side. That comprises all the jurisdiction in my territory, all that is over there in the line of traps—superintendent of traps, seines, and gill nets. It covers all the territory in the State of Washington, in the lower [562] river, and includes Sand Island. I have been in the employ of plaintiff ever since '98. I have acted in the capacity of such superintendent ever since, and I have been frequently at Sand Island, and I say that Sand Island

(Testimony of R. A. Hawkins.)
is not a crescent shape, not that you can notice at all. There are no bays, not a sign of a bay, no curvature to the shore, not to amount to anything that you would notice. You can walk along the beach as far as you want to and see the tide going and coming, and just the same if you should look out 100 feet or 200 feet, no difference to me; I never saw any difference. The only set net I ever saw operated south of Sand Island was the one that McGowan had there. I saw it there. I do not know how long it was there, I should judge, a week or two weeks, somewheres around there, and I was there when he operated it. The reason I happened to be there was that I made it my business, and I went there to see what they were doing. I was there several times. The water is muddy there sometimes. It is not muddy most of the time. It is muddy most of the time; it clears up about the 25th of June, and from that to the 10th of July, and then to the 25th of June the water is sufficiently muddy for set net fishing. The fishing season opens on the 1st of May, and so far as the condition of the water as to being muddy or otherwise is concerned, it would be good from the 1st of May to the 25th of June. If set nets could be fished there, it would be about two months that a set net could be operated, and that would be at night-time after the 25th of June. I don't think a set net could fish at any time. I think if a set net could be operated there, the water would be all right for catching fish up to the 25th of June. The water would be clear, but it

(Testimony of R. A. Hawkins.)

would be too strong, but if it could be fished at night, the water would be suitable for that purpose. A set net cannot be operated in a tide like that. There should not be much tide; there should be slack water for a set net to fish. There is slack water at every tide, but only lasts a few minutes, when the tide is **[563]** slack. It don't stay slack very long down at the mouth of the river, especially the first of July when the freshets come. The period you call slack water would cover an hour and a half, something like that before it turns. I should judge you should have still water in order to operate a set net, not more than two miles an hour, something like that. An eddy is practically still, for the reason that the tide does not run there, and the tide goes up and where there is bays, or anywhere the water goes in and forms, and the tide goes by. An eddy is a whirling condition of the water, it passes by, goes straight by, and where the bay is inside, the force of the tide goes outside of it. I say that it is impossible to seine there at times, because of the condition of the tides. If a set net were anchored there it would not catch fish at such times as you are able to use drag seines. The current would be too strong. We can fish on strong tides, but cannot fish on the first of the ebb, or two hours after the first of the flood.

Q. During the time that you are fishing, why wouldn't a set net catch the fish?

A. There would be no set net there.

Q. Can't you anchor a net so it would stay?

(Testimony of R. A. Hawkins.)

A. You might rock it down, but there would be no way for the fish to go in, it would be impossible; the tide is so strong every mesh would be closed.

Q. You set the net diagonally with the current?

A. No, sir; if you set the net diagonally with the current it would not catch the fish; if you set it crosswise with the current the tide there forces everything closed, just the same way as if you put it end down. Your cork line would go down and your lead line would come up; I have seen that tried lots of times.

Q. By anchoring it perpendicularly with the tide, why would it close? [564]

A. It is impossible to anchor a set net there and have the meshes square where the fish go in, where there is such a strong current.

Q. Fish can strike the mesh and be held without being entirely closed?

A. The mesh won't be square where the tide is, it is impossible. You cannot put a set net out there and have it square where you have a running tide.

Q. How many fish did those nets catch there? You were not about their catch, were you?

A. Yes, I was there all the time, practically every day.

Q. While Mr. McGowan's nets were out there?

A. When his nets were there?

Q. Yes.

A. I was not there but very little first. I was there a little. We had a net fishing our grounds, No.

(Testimony of R. A. Hawkins.)

3. I was not there much when McGowan was seining.

Q. When his set nets were there?

A. Yes, I was around there.

Q. How much were you there?

A. I was there—oh, I must have been there three or four days.

Q. You say they did not catch any fish?

A. No, sir, according to the men that were running the net.

Q. You don't know yourself?

A. Yes, I asked if he caught any fish.

Q. Did you know yourself?

A. No, I never seen them take any.

Q. What time of the year were they there?

A. They were there somewheres in June.

Mr. WELSH.—Q. You never lifted the nets, did you? A. No, sir.

Mr. HADLEY.—Q. Was it the very beginning of the fishing season?

A. I don't think it was. **[565]**

Q. It was before the fish began to run?

A. I think they figured on getting there just a little before we did, but we were there as soon as we saw they were going to molest us; I think that was the proposition.

Q. The fact is there were very few fish running at that time?

A. I do not remember, I do not know whether any fish were running at all or not during that time.

Q. You do not know?

(Testimony of R. A. Hawkins.)

A. I cannot remember; might have been and might not have been.

Q. If the fish had been running there you would have been there, with a seine.

A. No, sir, the water was muddy and we cannot catch fish when the water is muddy.

Q. Why has muddy water anything to do with it?

A. When the fish hit the seine they turn around and go back to sea. It is then we gill net, or anything like that.

Q. If they see the gill net, why don't they turn around and go back to sea?

A. They cannot see the gill net when the water is muddy.

Q. Don't they see the drag seine?

A. No, sir, we have them pounded and just the minute they hit it they turn and go back to sea.

Q. Isn't the muddy water some difficulty for either net? A. No, it is different, we tend our nets.

Q. Can't you attend a set net?

A. Yes, but a set net won't catch fish in clear water.

Q. You set them at night?

A. Yes, because it is dark.

Q. If it catches them at night, then it must be valuable for catching fish even in clear water, isn't it?

A. No, sir, the set nets won't catch fish in clear water.

Q. Not even at night-time? **[566]**

A. Yes, it will catch fish in clear water in the

(Testimony of R. A. Hawkins.)

night-time, because it is dark, but it won't do it in the daytime.

Q. Why don't you answer the question?

A. I did.

Q. You said it would not do it?

A. I thought you said daytime?

Q. I said night-time.

A. Excuse me. I was on Sand Island with Mr. Reed and Mr. Latourelle last Friday. We were there a little longer than three hours. I think if they had stayed a little longer they would have seen a stronger current, but they would not have seen an eddy. It is impossible to see an eddy there. There is no eddy on the south side of Sand Island before the "Republic." I have never seen any, and I have lived there 20 years, nor any other man.

Q. Then, all these men who have testified that they have seen eddies, they have lied?

A. I don't know what they call an eddy.

Q. There must be a wide difference of understanding between you as to what is an eddy, or else somebody is mistaken? What is an eddy?

A. Well, an eddy is a place where the tide rushes by and forms about a point where it goes around a point, and in that point is what they call an eddy. There are very few eddies I ever saw that would extend more than 100 or 200 feet, because if it was the tide would gradually work in there.

Q. Doesn't the water rush around the upper part of the island?

A. No, sir, it goes right straight up.

(Testimony of R. A. Hawkins.)

Q. Straight up?

A. Why should it rush around, why should the tide back up around?

Q. With the ebb of the tide, how about it?

A. With the ebb of the tide divides it, besides at the head of the island one goes down Baker's Bay and the other comes down in **[567]** front of Sand Island.

Q. Then, there must be a strong current there, off of the south shore?

A. Yes, on the south side there is no water on the inside.

Q. That current is thrown out towards the center of the river?

A. No, sir, comes down past the island.

Q. Isn't the east end of the island diagonal to the general portion of the island?

A. No, sir, it is practically straight all the way down.

Q. Slopes to the southwesterly, doesn't it?

A. It runs pretty nearly east and west, very little difference there.

Q. The east end of the island, what direction does it run? A. The tide?

Q. I am talking about the end of the island. What the direction is, easterly shore of the island; what way does it run, east or west, north or south?

A. You mean the tide on the east end of the island?

Q. I mean the island itself. What course does the shore take?

A. It is practically east and west, I should judge.

(Testimony of R. A. Hawkins.)

Q. I asked you what direction the east end of the island runs—what direction does that shore take, does it take a north and south course?

A. No, it goes right out—it is right in line with the head of the island; probably goes out east.

Q. The east end of the island goes out east?

A. The tides go out from the east end.

Q. This island called Sand Island runs in a general direction from east to west, does it not, the long way of the island is from east to west? A. Yes, sir.

Q. The south shore runs practically from east to west? A. Yes, sir. **[568]**

Q. This island has an east end? A. Yes, sir.

Q. What direction does the shore of that east end take, does it run north and south?

Q. You go down to the Cove; there is a place they call Oklahoma.

Q. Where is that?

A. That is right across from Fort Canby, that is where it empties into Baker's Bay. The tide runs out at the east end from Baker's Bay.

Q. What is the shape of the east end of Sand Island?

A. It is practically north and south, pretty near.

Q. Now, that is what I have been trying for ten minutes to get you to say; but it does slope to the southwest? A. It slopes to the southwest?

Q. Yes?

A. I don't see how it could slope to the southwest.

Q. It slopes from the northeast to the southwest?

Mr. FULTON.—You mean, starting from the

(Testimony of R. A. Hawkins.)

southeasterly end, you mean it slopes to the northwest?

Mr. HADLEY.—From the northerly end slopes to the southwest.

A. There is not much slope; you walk down the island, and I can show you by the diagram.

Q. I am only judging by the maps I have seen.

A. Which way do you mean?

Q. The general direction of the east end of Sand Island is what?

A. Here is the east end (indicating on plat).

Q. What is your answer to the question?

A. The east end is just a little point here.

Q. It is practically a cape, then?

A. Yes, a small place, just gradually runs around this way.

Q. But what is the distance, would you say, across the shore of the east end of the island?

A. Oh, it is—right on the point I should judge two or three [569] hundred feet, 200 feet, something like that.

Q. At flood tide that point breaks the current?

A. Sir?

Q. At the ebb tide that point breaks the current?

A. Ebb tide comes right down past here and goes out, and it gradually goes down here a little (indicating) for about an hour, I should judge, or an hour and a half, then turns around and runs back out.

Q. This easterly end of the island breaks the current of the ebbing tide and divides in two parts.

A. Yes, practically.

(Testimony of R. A. Hawkins.)

Q. Now, where does the tide that breaks on the south go?

A. Why, it practically goes right down the island, the tide is so strong it don't affect it.

Q. Wouldn't the force on this end of the island throw the water out towards the current of the river? A. Has no effect at all.

Q. Some goes straight down?

A. Some goes straight down. A man laying out a gill net comes way down there and comes right to the "Republic"; I have done it thousands of times; it goes right down the island.

Q. You say the only difference between the conditions as they existed on the day you were there with Reed and Latourelle is the difference between full moon and neap tides? A. Yes, sir.

Q. What kind of tide was it that day?

A. That day I think it was probably—it was low water at—well, I should judge about half and half, it was not quite neap tide yet.

Q. What do you mean by neap tide?

A. When the tide don't run out, that is, on the bar when it don't—there is an eight feet tide and a nine feet tide, and a seven foot tide and a six foot tide, you see. A neap tide is only [570] a small tide, that would be a six foot tide, or a five foot tide.

Q. The full moon tide is a big tide?

A. Yes, nine feet—nine feet five.

Q. You say that was full moon tide that day?

A. No, sir, I did not.

Q. Have you any interest in those sites and those

(Testimony of R. A. Hawkins.)

grounds off Sand Island?

A. No, sir, I have none whatever.

Q. You have no prospective interest in the result of this litigation? A. Sir?

Q. You have no prospective interest in the result of this litigation?

A. No, sir, I haven't a bit of any kind.

Q. You are simply employed by the plaintiff and have no personal interest in these locations whatever? A. I didn't understand the first word.

Q. Employed?

A. Yes, I have been employed for years with them.

Q. You have no arrangement with the plaintiff by which you are to share in the result of this litigation? A. No, sir, never had.

Redirect Examination.

(By Mr. FULTON.)

Q. In answer to a question propounded to you by Judge Hadley you pointed on this map, Defendants' Exhibit "F," and said that gill nets put in the water here would run right down along the line; what do you mean by here (indicating)? Do you mean that a gill net placed in the water at the easterly end of Sand Island— A. They come right here— [571]

Q. Wait a minute. (Continuing.) Placed at the easterly end—over in front, that they would drift right straight along in front of the island?

A. They would come right out here—they would even come up to here (indicating).

Mr. WELSH.—Q. You mean the east end of the island?

(Testimony of R. A. Hawkins.)

A. Yes, sir. They throw the net out at the east end, their buoy probably in 25 feet or 30 feet of shore, maybe less than that, and they drift all the way down here.

Q. In front of the island? A. Yes, sir.

Q. About 25 feet from the shore?

A. Yes, sometimes they have to go in near, not to pick up one end and in order to keep from coming in.

Q. How often have you seen that done?

Mr. WELSH.—Objected to as immaterial.

A. Thousands of times while I was around there.

Recross-examination.

(By Mr. HADLEY.)

Q. How were they operating those boats that drifted down there; do they have drags for the boats? A. Drags?

Q. Yes, for the nets? A. Drags?

Q. Yes, I don't know what else to call it.

A. Do you mean, did they have a net?

Q. Something that dragged on the bottom?

A. All gill nets are leaded in order to keep the bottom lying down.

Q. If they are in this shallow water they would drift out in that way—

A. That water is not shallow there.

Q. Next to the shore?

A. Not very,—not so very; if they are in on the shore it is [572] shallow there, but it is not out at the outer end.

Q. Is it not true that these boats were drifting down there because they were wanting to fish in there

(Testimony of R. A. Hawkins.)

and they arranged what they called the "coyote" method of dragging them in there?

A. There is no coyete method up there whatever.

Q. Maybe you know it by some other method; that is the name Mr. McGowan gave me; I don't know. The fishermen do fish in that way?

A. The fisherman comes and throws his net out there whenever he wants to.

Q. You say the boats would drift down next to the shore?

A. Yes, sometimes they would be on the outer end of their net.

Q. Suppose they set them further out in the river, where would they drift?

A. They would gradually go down. It all depends on the current, whether strong tide, or the wind; the wind generally has a little to do with the tide.

Q. They would drift with the main current?

A. As a rule, yes.

Q. Anyway outside of this ground the set nets were on? A. It is right on the ground.

Q. These set net locations are right in the main current of the river?

A. The set net locations in the main current?

Q. Yes?

A. No, they are not in the main current; I don't think they were in the main current.

Q. These gill netters would drift towards the main channel?

(Testimony of R. A. Hawkins.)

A. They drift in the main channel and drift all over.

Q. Where is the main current and channel of the river at that point?

A. Well, there are practically two channels, one goes towards [573] Astoria and the other comes up this side.

Q. Which side? A. Abreast of Sand Island.

Q. Now, south of Sand Island, where is the main ship channel?

A. The main ship channel is quite a ways south of Sand Island.

Q. How far out?

A. Well, I see ships going by there—oh, outside of the length of the net; there are lots of times when they are going up to the mills.

Q. Give us your best guess.

A. Three hundred or two hundred and fifty fathoms.

Q. About 1,800 feet out? A. Yes, sir.

Q. Fifteen to eighteen hundred?

A. Yes, sir, plenty of water there for any ship.

Q. These gill netters if they set out in the river will naturally drift down that current?

A. Yes, sir, they drift right down.

I have heard what is known as the coyote method of gill netting. These are operated only in a shallow place on some mud flat. I never observed any fishermen indulging themselves in the coyote method in front of Sand Island. The set nets were in the main drift of the gill netters, practically right

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(Testimony of R. A. Hawkins.)

in their drift. There are practically 3,000 gill nets on the lower Columbia River. This is right in the main drift. Of course, they have got other drifts, and got many of them, but they drift right over the ground where the outer buoys of Mr. McGowan's set nets were located.

Recross-examination.

(By Mr. HADLEY.)

Q. How is it that they drift there, as you state, before they drift into the channel?

A. The channel goes on out. [574]

Q. The channel does not reach to the shore?

A. Yes, the channel practically goes pretty well up to the shore,—not exactly the channel, it is water; the water—there is good water there all the way down.

Q. I understood you to locate the channel about 1,500 feet out from the shore.

A. That is where the ships go.

Q. That is not a strong current?

A. I don't think it is any stronger out there than it is 100 fathoms this side.

Q. Isn't it true that a current like that falls within certain boundaries and the water forms a sort of a bank and does not have the velocity of the center of the stream?

A. No, sir; I think about one of the strongest places is in between the "Republic" and where McGowan had his set net; I have been there with the launch and could not hold her there with anchors.

Q. Between the "Republic" and the shore?

(Testimony of R. A. Hawkins.)

A. That is where McGowan had his set nets.

Q. It set there all right, didn't it?

A. Yes, but we had to get up steam pretty quick, that is we got our engine going, we were afraid we were going into the breakers.

Q. The set nets sat there?

A. He never had a set net there; he had his buoys there. He only had one set net out that I ever knew of; that was way out at this end; he was afraid to go down on the other end.

Q. It was the buoys you refer to?

A. Yes, sir. I don't think he ever had a set net there that I saw. He had buoys.

Q. Did you verify the complaint in this case for the plaintiff?

Mr. FULTON.—I object to that as incompetent, irrelevant and [575] immaterial, and I instruct the witness not to answer unless he wants to, because it is a familiar rule of law that you cannot ask a witness concerning a writing unless you refer the writing to him.

Mr. HADLEY.—You may answer the question.

A. Do I have to answer that?

Mr. FULTON.—Not unless you want to.

A. I won't answer.

Mr. HADLEY.—Q. Didn't you swear when you brought this action and verified the complaint that the defendants were maintaining set nets on that location down there?

A. That I said set nets were there?

Q. Buoys and set nets?

(Testimony of R. A. Hawkins.)

Mr. FULTON.—I object to that question; the writing is the best evidence. A witness cannot be examined concerning a writing unless presented with the writing; it is unfair, and the Judge knows that.

Mr. HADLEY.—Q. You do not know whether the complaint in this case—then you do not know whether the complaint in this case alleges that the defendants were maintaining set nets there or not, do you? A. No, sir.

Mr. HADLEY.—That is all.

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. Did McGowan ever attach any web or set net to the two buoys?

A. I will answer that this way. I don't know whether McGowan—there was a man named Sankala had a piece of seining web, but it was about four fathom seining web, it was to a buoy, and below that was one piece of gill net, but I don't think it was 50 fathoms, no, I know it was not that, I think there was one hundred feet, and the two ends of the set nets were tied to [576] it, up and down stream; that is all they ever put out to my knowledge; I was around Baker's Bay there all the time.

Q. The two ends of the net were never fastened to any stationary object or anchored? A. No, sir.

Recross-examination.

(Interrogated by Mr. WELSH.)

Q. A few moments ago you testified that we did not catch any fish in our net.

(Testimony of R. A. Hawkins.)

A. According to your own testimony, your own men, yes, sir.

Q. And now you mean to maintain that we did not have any set nets there that would catch fish?

A. No, sir, I did not.

Q. Is that so?

A. I said there was one buoy up there with one piece of seine on it.

Q. That is all?

A. No, sir, there was one set net.

Q. No other set nets that were in before they were completed, fully completed?

A. Never saw one.

Q. Were you out there with the fellows who pulled up the buoys and destroyed the nets?

A. No, sir, I was not.

Q. You did not assist them in taking them up?

A. No, sir.

Q. You do not know then, for sure, excepting from hearsay?

A. I was there the day before, there was nothing there then.

Q. Did you examine each net?

A. I stood on the shore, and there was not anything there whatever.

Q. Then, is it any wonder they did not catch any fish?

A. The fishermen had taken all out to sea practically the day [577] before we got there.

Q. You mean to say that the fishermen were drifting at that season of the year?

(Testimony of R. A. Hawkins.)

A. Yes, took pretty nearly all of them out before we got there; I don't think we took out more than two or three, I don't think so.

Q. This was what time of the year?

A. In June.

Q. You mean to say there were thousands of fishermen drift netting at that time?

A. I didn't say there were thousands drifting.

Q. About how many men were using drift nets and drifting in that territory at that time?

A. Quite a few; the water was muddy.

Q. What do you mean by quite a few?

A. There must have been a hundred around there.

Q. You mean to say they had commenced and were drifting, and they used to drift there and get their nets caught in the buoys and pulled out our buoys; our fish nets?

A. Yes, sir; I didn't see the fish nets, just the buoys.

Q. The nets remained there; they didn't pull them out?

A. I didn't see them get on it; they only had one net there; I didn't see them get on them.

Q. Did you say we did not catch any fish?

A. That is what your men told me.

Q. Then you next say we had a net—how many fish nets did we have out there in the water?

A. I only saw one.

Q. You only saw one? A. Yes, sir.

Q. Then, is it any wonder we did not catch any fish?

(Testimony of R. A. Hawkins.)

A. If you cannot catch any with one, what can you catch with nine; [578] if you could not catch a fish with one you could not expect to do so with nine?

Q. Not when people were pulling them out.

A. We never touched them up to that time; the gill netters took them out before we got there.

Q. Didn't you testify in the prior hearing that you pulled them out as much as three times?

A. I will admit after fishing started. I think they put them in after we pulled them out once.

Q. At that time you testified you pulled them out something like three times?

A. I am not sure whether three or two or one time.

Q. When does the fishing season start?

A. The 1st of May—that was after we started, somewheres around the 1st of July.

Q. Then, will you swear that while our fish nets were in there that the fish were running in any quantities at all?

A. I told you I don't know anything about the fish running at that time, I cannot remember whether the fish were running thick or running at all.

Q. When you people went on the ground you saw our buoys there?

A. We saw one or two of them, I don't know how many.

Q. You knew they belonged to McGowan?

A. I thought they were McGowan's.

Q. You went right in there like highwaymen and proceeded to take them out?

(Testimony of R. A. Hawkins.)

A. No, sir, put our seine out, drifted down and caught them, they came ashore and were taken out that way.

Q. Simply paid no attention at all to the rights of these defendants?

A. We had to seine, what else could we do? **[579]**

[Testimony of E. Polson, for Plaintiff.]

E. POLSON, a witness called on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is E. Polson; I reside at Brookfield in Wahkiakum County, Washington. I have lived there since 1874. My business is operating set nets and gill nets and I have been doing that steadily for the last seventeen years. During that time I have operated both set nets and gill nets. I have been operating such appliances at a point below Jim Crow Point; that is about half a mile below the Brookfield cannery, and somewheres about twelve miles from Astoria. The tide flows there at all the times, and full moon and new moon we have about a nine foot tide there. I have been operating set nets there for the last seventeen years, making it my regular business. The best places that I have found any place is a regular eddy where the set net stands still, and there you can get fish; and if you go outside where there is a strong current—I have tried different ways—you cannot get nothing there, and that has been my experience for the last seventeen years. I am

(Testimony of E. Polson.)

acquainted with Sand Island on the Columbia River. I am not much acquainted there, but I have been down there. I have been there and around the island but I am not much acquainted with the depth of the water; I don't know that. I am acquainted with the waters on the south shore of Sand Island, and I know there is a strong tide there all the time, and I have seen the waters there and know set nets could not be worked there. You cannot put a set net out in the current, for you would never catch anything in it. The reason for this is that it must be the same there as up above where I am fishing. I can catch nothing in the strong **[580]** current, because there is too much strain on the net, and if you set the net up and down a little the meshes will close and no fish will get into it. I have tried that, too.

Q. Now, from your knowledge and experience in operating set nets on the Columbia River in the tidal waters thereof, during the last seventeen years, tell me what in your judgment would be a fair price to pay for the use of the waters in front of Sand Island for the sole purpose of operating a set net.

A. I could not tell you that, because they would not be worth a great deal, because the net wouldn't do much good there, you might catch a fish there on the turn of the two tides, on top of high water and on low slack, you might catch one or two fish there; that is all you would catch. What it is worth all the season I could not tell you.

Q. Is it worth anything?

(Testimony of E. Polson.)

A. It would not pay a man to attend to it.

(Witness continuing:)

To catch fish in set nets in the daytime you must have muddy water, and if you don't have muddy water you won't catch any in the daytime, but you will get them at night. Generally speaking, we have clear water in the Columbia River the latter part of July or the middle of July. We usually have clear water about that time. It commences to clear up and from then on to the end of the season we have practically clear water.

Q. What effect would the current have on the set net if it should be attached to two buoys, a set net say 75 fathoms in length, placed across the current in front of the south shore of Sand Island?

A. The current is too strong, the net will bind up too much, just the same as a board, and the fish won't go into it; if they do get into it the current will take them right out. **[581]**

(Witness continuing:)

Sand Island on the south shore is a straight island exactly where it comes down to the "Republic," there is a little bend there, but there is a tide coming each way, and if they call that an eddy I don't know, but I call it a tidal rip; the two meets and it goes down in here. There is no eddy but a tide rip, that is what it is. There are no eddies in front of the south shore of Sand Island. An eddy in which to operate a set net there must be some kind of a point from end of shore what sticks out, anything with some kind of a point what sticks out, and that forms

(Testimony of E. Polson.)

an eddy and makes back water, and that makes an eddy, but where we have a straight shore along anywhere it don't make any eddy. Where it forms a little bit of an eddy and sticks out there you can put a set net in and it will stand still; you will get fish, but outside of that you won't get fish, and you get outside you won't get nothing, but get your set net in the eddy and you will get fish; I tried it. These eddies are all downstream from the point of the land. The curve goes around and around and it forms a regular center in there and the water stands still. You can put a stick of wood there and it stays there for hours and never goes out for half a day unless the wind blows it out. You might put a few set nets in the water off from the shore of Sand Island there, but if you get anything you will be lucky. You can put a set net anywheres; if you get anything in it, that is the next thing. But in front of Sand Island it would be no good.

Cross-examination.

(Interrogated by Mr. HADLEY.)

Brookfield is about twelve miles from Astoria, and I guess it might be ten miles down to Sand Island, so far as my judgment. I have fished pretty nearly all the way down to Sand [582] Island; I haven't set net but have been drifting down for the last year. I used to fish down there with gill nets. My set net operations were at Jim Crow Point. Jim Crow Point is about half a mile below the cannery, and that is about twelve miles to Astoria, makes it about twenty-two miles from Sand Island. We have a tide

(Testimony of E. Polson.)

there every day. I have operated set nets during the last seventeen years, sometimes one, sometimes two and three, but no more than three, and I have caught many fish in set nets, according to how the fish run. Sometimes don't get many and sometimes get quite a few. They are not like gill nets, they set there and if the fish come it is all right. You catch fish in set nets in an eddy; you cannot catch them in strong current with a set net. The current is always too strong in the Columbia River up where I am, you cannot catch anything there. You want still water for set nets; the water is most always still in an eddy. I have been a good many times at Sand Island and come down the river in 1871. I have been at Chinook, I could not tell you how many times. I never fished on Sand Island. I was on Sand Island just a week ago, I think it was on Monday I went down there in a launch. I went down for the sailing—seeing how the water is and seeing if it amounted to anything down there. I went down there with Tom Nelson. I do not know what his occupation is and I do not know whether the boat I went down in belonged to the Columbia River Packers' Association. I do not know what he wanted me for, he told me to look around. I was very familiar with Sand Island and I went down there because I had nothing else to do. I had looked over the waters there lots of times before. I just went up and down in front of the shore of the island in a boat that day. I saw a tide rip in front of the "Republic." It is a little bit of a rip coming in all

(Testimony of E. Polson.)

directions but it could not create an eddy. There is only one tide rip there. We went pretty far inshore but did not go out towards the center of the **[583]** river. There might have been eddies further out between that and the main channel, but I did not see them, and there may have been a good many places there where there are eddies in which set nets would be placed further out in the river, but I did not see them. The Columbia River Packers' Association told me it wanted me to come here and testify for them. I was down there that day about half an hour. It was ebb tide, about an hour and a half or two hours before low water. When the water is muddy in one place in the river it is muddy all over, when there are freshets in the river, and that is true of the whole river. When the water is muddy down at Sand Island it is also muddy away up above. There is a little bay in front of Sand Island down towards the wreck of the "Republic," just a little bend there, not a regular bay, just a little bend. It looked to me like a hundred feet or more. I think it ran a hundred feet or more back in the island and about a quarter of a mile on the shore. The tide comes down in front of the island pretty strong; it comes down straight, I watched it that day. I have never watched it before and that was the only time that I ever saw it. I was never there the first of the ebb.

[Testimony of H. M. Lorntsen, for Plaintiff.]

H. M. LORNTSEN, a witness in behalf of the plaintiff, after being first duly sworn, in answer to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. FULTON.)

My name is H. M. Lorntsen; I live in Astoria, Oregon; I have lived there since 1889, and began fishing on the Columbia River in 1887. Gill net fishing is the only kind of fishing I have followed. Most of my fishing was from the head of Sand Island down to the mouth of the river. I am familiar with Sand [584] Island; I am down there every season, more or less, and have been down there ever since '89. I am secretary of the Columbia River Fishermen's Protective Union, also agent of the Alaska Fishermen's Union. The Columbia River Fishermen's Union is an organization of Columbia River gill net fishermen. I have observed the shore of Sand Island during that time and I am familiar with the character of the ground in front of it. I have fished there lots of times and seen others fish there. I do not think the south shore of Sand Island is of a crescent shape; it is about as straight as any shore line can be. I should judge there are at least fifteen hundred boats engaged in gill net fishing on the Columbia River, and have been for the last several years, and that number I think are generally operating in July operating from July to the end of the season. I know where the main drift of these gill netters are. There is one drift commencing from the Government dock

(Testimony of H. M. Lorntsen.)

from Fort Columbia dock. They lay out from somewhere up around that dock and drift down. This dock is on the Washington shore. The nets work more and more, sometimes striking land along Sand Island; other boats take them further away. That is one drift. The others commence to fish from the upper end of Sand Island—what they call coyote; they lay out half a net and pick up and go down again. Then, further down the island, about half way, is another place they commence to lay out and drift down. Those who lay out their nets from Fort Columbia, the current will take them down along the island, it just depends upon the tide—but if not, they go outside of the "Republic"; but as a rule they generally pick up when they drop over the head of Sand Island, they pick up their nets because they won't make any drift along the island; but sometimes they let the net go if they expect to get slack water down by the "Republic," because the principal thing is to keep the net in slack water. That is one of the main drifts in the **[585]** river and has been ever since I have been on the river.

Q. I will ask you to state in your judgment whether or not it is possible to maintain set nets in front of Sand Island, say along 50 to 100 fathoms from the shore.

To this question counsel for the defendants objected upon the ground that the witness has not shown himself to be competent; that he has not had any experience in set netting.

A. Positively no show for any set nets along the

(Testimony of H. M. Lorntsen.)

island, for the reason gill nets are drifting up and down the island. The current will always take the nets higher up or down, except at slack water. The gill nets would get snagged on the moorings of the set nets, and the result would be there would be no set nets, because they have no legal right there. It is a place for the people to use their right of fishery in common.

Mr. HADLEY.—We object to the witness stating what he understands the law to be; it is entirely immaterial to any issue in this case.

Mr. WELSH.—The Court having decided we had the prior and exclusive right to fish there with our set nets; it is not for you to say. We ask to have the above answer of the witness stricken out.

(Witness continuing:)

When the gill nets come along they simply get snagged and tear up the nets, that is so far as the gill nets. Another thing, there never could be any fish caught on Sand Island beach along there in set nets, because it is not a place for set nets; the current is sweeping up and down there. Now, a set net never **[586]** works to any advantage where the current is sweeping up and down, especially where there is such a strong current as on Sand Island; you could not get a set net to stay there, and even if you could make it strong enough to stay, you could not catch any fish in it.

Mr. WALSH.—I move to strike all of the testimony of this witness. In the first place, on the ground that the witness has not shown that he has

(Testimony of H. M. Lorntsen.)

had any experience with set nets, and for the second reason because he is giving an opinion involving the law, and all that sort of thing. No foundation laid; it is immaterial.

Mr. FULTON.—Q. You say that set nets will not catch fish. Just state why you know that, and what experience and observations you have made in regard to the manner of operating set nets.

A. I have had no experience with set nets, but I had experience with my nets getting on snags, and other men whose nets have got on snags. My experience has been that it turns up and down along the current; the current is going to tear the fish out if there is any in it, and that would place it in such shape that no fish would get in it because it pulls the meshes together.

(Witness continuing:)

Gill nets and set nets are identical so far as their construction is concerned, and anyone that is operating a gill net knows in what condition the net will gill fish.

Before they commenced to construct the jetty on the Columbia River we had to drift on the Oregon side over a certain drift in front of Fort Stevens. We used half a net in that drift; as soon as we got through the drift we got good fish; we could see the fish taking the net. But if we left the net until it swung around, we would have no fish. I fished with Jens Nelson. We were green over there, and someone told us how to fish, and we were going to do it according to instructions. We lay out the [587]

(Testimony of H. M. Lorntsen.)
net and the fish was kicking, and of course Nelson wanted to get all the fish he could get; but when we got to the fish he gave it a swing and we didn't get one fish; they all tore out. We went over the ripple square and the net swung with the current, and the force of the current along the end tore the fish out. Same thing with a set net. I have seen lots of men get snagged and have seen some of the gills of the fish left. You can see the gills; very seldom the fish stay in. Accidents will happen that the fish get tangled up in the net and it will stay; but most of the time they drop out.

Q. I wish you would describe the current in front of Sand Island, whether it is straight up and down, or how.

A. According to the tide; if it is running out it goes down along the island; if it comes up, it comes up along the island. Along the island the tide in shore stays about the same tide as the tide table, but outside it may run out a couple or three hours longer. But there is a time when the tide comes in, the tide rip comes in between the two tides and strikes the beach first. Sometimes the men lose their net, not lose it, but get tangled up. Drifts come in that tide rip, and nothing can stand it. If a set net were set out across that tide rip, there would be no set net left. This tide rip carries a lot of rubbish, consisting of trees and roots and all such stuff, large and small of all kinds. When the time of the freshet comes this rip is more or less caused with the first of the freshet; more stuff coming down in there.

(Testimony of H. M. Lorntsen.)

There are always more or less logs and roots floating around.

There are no eddies in front of the south shore of Sand Island.

Q. Mr. McGowan stated that there was quite a heavy current running around the easterly end, the head of Sand Island, [588] at certain stages of the tide, which ran even out into the main current of the river, and where it met the current coming up from the south side, it formed an eddy up there?

A. That is not an eddy, it is a tide rip; it lasts probably an hour and it is over. That is not an eddy, it is a tide rip.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I fished from 1887 to 1899 and since that time I have done no fishing. All of my fishing was on the Columbia River, and most of it was done from the head of Sand Island down to the mouth of the river. I have been secretary of the Columbia River Fishermen's Protective Union since 1899 in the spring. I am also agent for the Alaska Fishermen's Union, and secretary and treasurer of the United Fishermen of the Pacific Coast. The headquarters of the Columbia River Fishermen's Association is at Astoria, and the headquarters of the Alaska Fishermen's Union at San Francisco, and the headquarters of the other organization is at Astoria, Oregon. These organizations keep me pretty busy, and my business keeps me in the office with correspondence,

(Testimony of H. M. Lorntsen.)
and also by going about from place to place.

Q. The last fourteen years then, you have not had an opportunity to study and observe the use of fishing apparatus, have you?

A. Yes, sir, I have, as a practical fisherman, I have. I have an opportunity to study that every season, because I was fishing before I went into this place, and it was my business to attend to the work of those men and I am on the river every season. If anything is wrong I am asked to investigate and find out and see what it is.

(Witness continuing:)

To enlighten your mind a little bit—maybe you won't [589] care for it, but anyhow, the Columbia River Fishermen's Union, their principal work that I do, and where I come in contact with things outside of the office is during the fishing season. During that season I have nothing to do with the Alaska fishermen, I have gotten through with them, they have left. Now I take up the work of the Columbia River Fishermen's Protective Union and I attend to that exclusively, so I have plenty of time to attend to the business of the Columbia River. Then in the fall, after I am through with the Columbia River business, the fishermen come back from Alaska and I attend to that. Just my special time I attend to the other fishermen's business. But the fishermen are doing the fishing, they are operating the gear and I do not help them.

Q. You do not believe in fixed fishing appliances, do you?

(Testimony of H. M. Lorntsen.)

A. Not absolutely, not where they interfere with the common rights of fishery.

Q. You are opposed to such a thing?

A. Where they interfere with the common rights of fishery.

Q. You are opposed to traps?

A. Certainly, traps are opposed to the fishing industry.

Q. You started to pull out a trap once, didn't you?

A. Yes, I succeeded.

Q. Didn't the sheriff pull you?

A. Not that I know of.

Q. Didn't the sheriff tell you, the sheriff of Clatsop County, tell you he would shoot you?

A. When did that happen?

Q. Did it ever happen? A. Not to me.

Q. You never heard of that?

A. I never heard any sheriff say he would shoot me.

Q. Didn't you have an organization for the purpose of going [590] up and pulling up a regular trap?

A. Some years ago I hired a crew to go up around Browns Park and pull out a trap.

Q. That was the case; you didn't pull out any traps?

A. It was because the trap had no legal right there.

Q. You do not think that any trap has a legal right?

A. Not where it interferes with the common right of fishery.

(Testimony of H. M. Lorntsen.)

Q. You do not believe any trap—

A. Where it don't ever interfere.

Q. You do not believe in set net—

A. What I mean by the common right of fishery is where the currents can be used, one for another; everyone has the same right to the current.

Q. Well, your theory is, there should be no fishing except by gill net?

A. Except where they interfere with the common right of fishery.

Q. How can you fish—can you fish anyway, except by the common right of fishery?

A. Not necessarily.

Mr. FULTON.—I insist that if these gentlemen want to discuss these questions they hire a special hall. I further object to this line of questioning as taking up the time of the Court.

Mr. WELSH.—We insist that the defendants have a right to interrogate the witness along this line for the reason this witness is opposed to all fixed fishing appliances, for the reason he has taken the law in his own hands, and hired men to go and take out and tear up fixed appliances where they were lawfully located and licensed, and for the reason it shows a motive for his testimony.

Mr. FULTON.—I insist a man has a right to take the law in his [591] own hands to abate a nuisance where it interferes and deprives him of a legal right.

Mr. HADLEY.—Counsel wants to argue to the Court that a man has the right to violate the laws, but we are not arguing it here.

Mr. FULTON.—We simply exercise this right because you gentlemen are exercising it through this case.

[Testimony of T. K. Johnson, for Plaintiff.]

T. K. JOHNSON, a witness produced on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is T. K. Johnson and I live on Tenasillhee Island in the Columbia River in the State of Oregon. Tenasillhee Island is about thirty-four miles or thirty-six miles from the mouth of the Columbia River. Probably about thirty miles from the upper end of the island. Sand Island, I should judge, is about three miles long, probably four. I am seventy-two years of age; I have lived on the Columbia River thirty-six years and during that time I have been engaged in gill netting, seining, trapping and set netting. I gill netted on the bar and then I commenced seining on Tenasillhee Island. I have also been engaged in the business of set netting on my place at Tenasillhee. The tide at Tenasillhee is about one-half as strong as it is around the head of Sand Island, and it is not as high as it is at Sand Island. If it is a nine foot tide at Sand Island we will get a raise of between six and seven feet at Tenasillhee, and the tide ebbs and flows there during normal conditions, but not when there is a [592] freshet in the river. During heavy freshets the current runs downstream all the time. I gill netted in

(Testimony of T. K. Johnson.)

and around Sand Island from 1876 to 1883. In 1907 I gill netted down at Sand Island, that is, in front of said island. I have been familiar with Sand Island for the past thirty-six years and I am also acquainted with the south shore of Sand Island. I didn't see any crescent shape on the south shore of Sand Island. The water line looks straight and at high water it makes kind of a little small waves where there are some low places. You see on the flood when the water comes in it strikes the low land first, or the low water, the rip tide, it is always straight. The south shore of Sand Island is not a bay. I have experimented in operating set nets on the Columbia River two or three years but did not make anything out of it. I have also observed other people operating set nets. I know the character of the water in which to operate set nets and it requires an eddy, and the kind of an eddy has got to be on the upper side where the current fixes it. It must be below a point that sticks out and the eddy is formed below. The undercurrent whirls back and forth and makes an eddy, and there must be a considerable projection of land out in the water so that as the current comes up and runs around it backs up on the other side, and the set net is placed in between the two currents. A set net cannot catch fish in running water where there is any current to amount to anything. I have tried it on my place on spare places I didn't use. At Tenasillhee I have two miles of beach. My beach is not straight, it has a bend or curve in it. I do not have as swift a current at my place as there is at Sand

(Testimony of T. K. Johnson.)

Island. I have tried to operate a set net in front of my island but it would not catch any fish. I tried it a number of times; I would set the net quarterly to the tide to prevent it drifting down, but the pressure of the water where it catches the [593] nets, it sets them down, you have a slack for the net. When that slack comes down it closes the meshes. I never tried to operate a set net with the current. I don't see what a man wants to set a net that way. In my experience we won't catch any fish. The current naturally closes the meshes.

Q. Is there any eddy or any place at any point on the south shore of Sand Island where a set net could be operated to catch fish?

To this question counsel for the defendants objected on the ground that it was leading.

A. I don't see where. Not to my knowledge, I don't know of any.

(Witness continuing:)

There are no eddies there. There are spots where there is comparatively slack water, but it is the only places where it floods; it is where the tide commences to come in on Sand Island down there by the "Republic," it commences to flood strong on the shore, but the current outside of that runs strong, and when the tide is running strong all the time there is no place making an eddy. As I said before, to form an eddy it has to be opposite against a running current and beach, where it is bound to make an eddy below, but from the "Republic" when it comes like that on a straight beach, that cannot make an eddy,

(Testimony of T. K. Johnson.)

because the tide runs down anyway. That beach there from the west side instead of being on the east side. If there was an east side of the point it would make an eddy, but on the west side it cannot make an eddy, because it comes down on the ebb tide and sweeps along. I have the same place at my place when there is a big freshet. When the current comes down it sweeps it right along and you cannot take it in. [594]

Q. State whether or not in your judgment and experience and knowledge as a fisherman whether or not a set net could be operated at any point south of Sand Island in the waters of the river.

A. Not to my knowledge.

Q. What in your judgment would be the value of the right to operate set nets or a set net there?

A. In my judgment a man cannot run a set net on Sand Island up in the front. In the first place the current don't have any opportunity for setting the net, and second, the fishermen are right there; that is, fishermen engaged in coyote fishing on the up tide of the island.

Here counsel for the defendants moved to strike out the foregoing answer and testimony of the witness, on the ground that the Court has held that defendants had the prior and exclusive right to fish there, and it is not for this witness to say that we had no right to maintain our nets there.

(Witness continuing:)

The fishermen would snag the set nets. One thing, set nets could not stay there for the current, and sec-

(Testimony of T. K. Johnson.)

ondly, the fishermen would not let them stay there. The fishermen would hang up on the buoys.

Mr. FULTON.—Q. Now, suppose you could operate a set net in front of Sand Island, how would the catch compare with a seine, seining?

A. With a seine?

Q. Yes, how would the catch, under existing conditions, compare with the amount of fish that can be caught with a seine under the same conditions?

A. Where are you going to set your net? [595]

Q. Supposing there was a good eddy there and that you could set eight set nets out there, and you could seine there at the same time; now, which could catch the most fish, providing set nets could be maintained there and could catch fish; what in your judgment would catch the most fish, set nets or seines?

A. Of course the seine would catch the fish.

Q. What would be the comparison in your judgment of the catch? How many more fish would the seine catch?

A. The seine might catch ten or fifteen tons of fish and the set net would catch five or six.

Q. Suppose the set nets were a success there and suppose they would catch all the fish that an ordinary set net would catch, how would the catch of a set net compare with that of a seine under those favorable conditions—say under those favorable conditions for a set net, how does its catch compare with that of a seine?

A. I don't care how good the set net would be you would catch probably on the tide 24 or 25 fish or

(Testimony of T. K. Johnson.)

more—twenty, while the seine would catch five or six tons of fish a day.

Q. That is about the comparison in your judgment between the catch of a set net and a seine?

A. Yes, I don't see any—the seine would go out twelve or fifteen hundred feet or two thousand feet and sweep the river, so it gets the fish; a set net sets 100 feet from the shore, what is it going to catch?

Q. Mr. McGowan testified that a set net about 75 fathoms long would catch about 70% as many fish as a seine would catch?

A. A set net 70 or 75 fathoms?

Q. Yes. [596]

A. I don't know where he would get about 75 fathoms set net on Sand Island.

Q. Yes. A. He may do it.

Q. In your judgment, could a 75 fathom set net be operated in front of Sand Island?

A. No, nor thirty feet; I don't see where.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I live at Tenasillhee Island and have lived there a good many years and I fish there all the time. This is about thirty miles above Sand Island. I am between Skamokawa and Cathlamet. A nine foot tide at the mouth of the river from Sand Island would be between six and seven feet at my place. You see, it drops off two feet, I believe, in twenty miles. I have fished at Sand Island a good many years ago and I also fished there in 1907, during the month of July and a part of August. I was gill netting dur-

(Testimony of T. K. Johnson.)

ing that time. I was there four weeks, I believe, and I fished from Sand Island down and so on. I start with my drift from the upper end of Sand Island and drift down to the inside and kept off the "Republic" wreck, and from there I would drift down, I would drift right along and keep wherever we can hold our nets. I said that Sand Island is practically straight on the south side at low water and at high water there is some break in the shore. You understand the meaning. You see the sand in some places is low, and naturally when the water comes there the low water fills them up. Of course after the island is filled up with high water it is straightened off. When the high water comes up and meets the high part of the island it cuts it off. I said there has never been an eddy on the south shore of the island, that is, you can't see an eddy [597] there, because there is no projection to make an eddy.

Q. You say you cannot catch fish in a set net in a current? A. No, sir.

Q. You don't mean that absolutely; you mean you can catch them in a mild current, can you?

A. I have a mild current, milder than any in the river, and I cannot. When the current strikes the set net when you anchor the net it is bound to reverse the meshes and when the meshes are reversed it is impossible for the fish to get into it.

Q. You say you set your net quarterly with the current up there?

A. To give me a chance to face the eddy. The friction will set the net in proper position, and then

(Testimony of T. K. Johnson.)

we have to lift the net up. You want slack water to have the net set.

Q. Why don't you set your net across the current?

A. The net will fish across the current, you understand, by quarterly. Now, this is the shore (indicating), we set the net like this (indicating); drop the anchor and slack on the rope—

Q. You mean when you set it quarterly you set it about an angle of ninety degrees with the current?

A. Not like that.

Q. Something like that. Can you set it square across the current, perpendicular?

A. That makes it worse, if there is a running current.

Q. The fish would not be as likely to be driven out by the current as if set quarterly; it would keep driving the fish in it if it is set square across the current.

A. You know quarterly means up the river, not down the river.

Q. You mean down the river quarterly from the way the current is going?

A. We are supposed to have slack water there on this point. [598] We just drop the net and fish out here and drop the buoy and have slack line enough to take the fish out. If that is slack line it naturally brings the net across. We kept them in the same position on either side.

Q. Well, you think that the set net cannot be operated in front of Sand Island for one reason, because the gill net fishermen would be in the way?

A. Not exactly that; there is no position. If the

(Testimony of T. K. Johnson.)

water was in an eddy there—an eddy, cannot get any eddy to fish. If there was no place for a set net, fish with the seine.

Q. Do you understand that if this is the defendants' ground that the gill netters would not operate there? A. Inside the eddy?

Q. In that territory there.

A. If the eddy catches the gill net he swings the gill net around. Anything that will hold a net on the shore where it is drifting, the strong current will swing it ashore.

Q. One reason why you think a set net could not be operated there is because the gill netters would be there in the way?

A. That is one reason; it is no place for it, and the current would not allow a net to stay there and fish. I never heard of a man setting a net in a strong current, I don't care who the man is, he cannot catch fish.

Q. Now, you speak of the comparative catch of a set net and a drag seine where they are operated in the same kind of water and the conditions are the same. I understood you to say that where a gill net might catch 24 or 25 fish that a drag seine might catch five or six tons? A. Yes, sir.

Q. You mean in a single day?

A. Twenty-four hours. [599]

Q. You would not expect a drag seine to get five or six tons every 24 hours, would you?

A. A seine will fish in clear water, which a set net cannot fish.

(Testimony of T. K. Johnson.)

Q. A set net fishes all the 24 hours?

A. No, he fishes any time there is muddy water.

Q. A set net is there to fish 24 hours?

A. It is in the water, but he don't catch a fish.

Q. Drag seines only operate a few hours of the day.

A. He operates until the tide turns and quits; if the water was muddy a seine don't fish because it don't catch any fish, neither does a trap catch any fish.

Q. A set net will catch in the night-time, whether it is muddy or not?

A. A set net will catch in the night-time, a trap don't.

Q. You find it to be that way?

A. I find it this way. A trap will catch the same fish a set net can fish.

Q. You had in mind a single trap. Now, if you could operate a great number of set nets in front of Sand Island there, they would catch a good many more fish than one, wouldn't they; isn't that true?

A. No.

Q. Wouldn't a good many set nets catch more than a single one?

A. Well, if you will lay set nets over the island, all around it, you might probably catch half a ton of fish a day or night-time; I don't think a set net will catch any. If a set net sets night-time and catches any fish—if he don't catch any, there is nothing to get. [600]

[Testimony of T. M. Nelson, for Plaintiff.]

T. M. NELSON, a witness on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is T. M. Nelson. I reside at Astoria, Oregon. I have lived in Astoria off and on for nearly thirty years. I am forty-eight years of age; I am by occupation a fisherman and cannery man on the Columbia River. I have had experience with both gill nets and set nets; I have had experience in set netting just one full season, but I have watched others operating set nets and understand how they are operated, and I know the character of the water and the kind of places necessary to operate them in order to catch any fish. I obtained this knowledge chiefly from my own experience that I had on the Cowlitz River and from observations that I have made on others, particularly around Brookfield. There has never been any set netting to amount to anything in the Columbia River below what is known as Tongue Point that I ever saw, on either the Oregon side or the Washington side. I am acquainted with Sand Island in the Columbia River and have been acquainted with it for about fourteen or fifteen years steady, consecutively, year after year, but there has been about eleven or twelve years since I have been actively in fishing. Two years ago I saw Sand Island about two or three times a week during the fishing season, and since that time I have been on the island three or four times. I am acquainted with

(Testimony of T. M. Nelson.)

the current in front of the south shore of this island. These currents run as follows: With the ebb tide they are running straight down, and with the flood they are running about straight up; of course it would vary at different stages of the tide, conditions of the moon, as to new and full moon; that is as to speed. I am [601] also acquainted with the south shore line of Sand Island. I should say it would be pretty straight, or almost straight, from the upper end and down to the "Republic" and from the "Republic" a little ways below the "Republic," it seems to sort of sheer off a little towards—I would say in a northwest course. In order to operate a set net I should have all the way from three and a half, on up, fathoms of water, and be set in still water so that the meshes of it would stand open and would not close with the current, or float. There is no such place in front of the south shore of Sand Island, and in my judgment a set net could not be operated in the waters south of the south shore of Sand Island, for the reason that there is absolutely no place to set it. You cannot string out a set net and make it go, say, on an angle of even 45 degrees with the current and hold it there, and if you were to place it up and down the stream, the net would simply draw together like a rope and the fish would not gill in it. In muddy water when set nets should be doing their best, that would lay a plank and act more as a lead, because the fish would not lead them, would back away from them; and in clear water of course a fish could see it and would not go near it; it would be as a lead.

(Testimony of T. M. Nelson.)

Q. What in your judgment would be the fair value of the use of the south shore of Sand Island, say in front of Sites 2 and 3, for set net purposes?

A. No value, for the reason I could not catch enough fish in a set net to feed myself.

(Witness continuing:)

There are no eddies in front of the south shore of Sand Island. There are certain tide rips there; these tide rips are not stationary and they vary with the stages of the river. When the river is high and we have a good freshet the tide rip does not show up very prominent, but when the river [602] begins to flood and the water recedes, the tide rips begin to show up somewheres around about low water tide, and somewheres about an hour before, and it works its way in towards the island until it meets the current coming off the flats, the flats below, and spends itself. There are no swirls in the waters of Sand Island or along the beach of Sand Island, that could be termed a swirl. I have seen swirls coming in off what they commonly call Peacock Spit, with the flood tide on full or new moon, but never saw them along the river. I have never seen them close along the island.

I know where the gill netters drift in the waters of the Columbia River. I suspect there are three or four hundred men fishing along Sand Island; some of them start in at the head of the island and lay out a piece of net; others lay in half way down; others will go two-thirds down, and in this way, one after the other, wherever it suits him, or wherever

(Testimony of T. M. Nelson.)
his particular fishing grounds lie, he will lay out a piece of net, say one hundred fathoms, or one hundred and fifty fathoms, maybe his whole net, and these will float parallel to Sand Island. They will float sometimes out to the amount of the net a man has out and also due to the state of the tide he is fishing; lay out when the tide runs strong and lay out fifty or sixty fathoms, and he will hug the island pretty close.

I know where the buoys were that Mr. McGowan placed in the waters in front of Sand Island in 1908. These were in the drift of the gill netters. In my judgment it is not possible to maintain buoys for the purpose of anchoring set nets there and not avoid contact with drift nets and place the net in a position to do work. These drift nets would get foul with these anchors and probably drag them out. **[603]**

Cross-examination.

(Interrogated by Mr. HADLEY.)

I have not been engaged in fishing for the last eleven or twelve years. I was actively engaged in fishing for about eighteen years; all along the Columbia River, and about fifteen years at Sand Island. I operated a set one year and during the rest of the time a drift net. I did principally all my fishing in the neighborhood of Sand Island, both above and below, and drifted in front of Sand Island almost every day that I was actively engaged in gill net fishing. I quit about twelve years ago that would be in 1900. I have never seen set nets operated on Sand

(Testimony of T. M. Nelson.)

Island. I know where Government Sites 1, 2 and 3 are on Sand Island and the set net locations claimed by the defendants in this action in front of Sites 2 and 3. I think the south shore of Sand Island is what you might call straight. I would say straight until some distance below the "Republic"; that would be two or three hundred feet, some such a matter. The shore goes off in a sort of northerly direction, and there are no indentations along the shore that I would call indentations; no little bays. The only curvature in the shore is one little spot you might call a curvature. I could not say what causes these tide rips, they are in the river, but they are not caused in any way by the shape of the shore line, and are not always caused by the meeting of two tidal currents, but that is the cause at times. A tide rip doesn't always show itself at the shore line. It is sometimes in the middle of the river and works in. It seems that my observations have been that when the freshet leaves the river the current sets north—the ebb tide currents set north, and as long as it runs the rip practically runs with it, and at the final conclusion of the ebb tide ceasing to run, it spends itself near the shore line, or at the shore line. The rip is not made by the current sweeping out from the shore line, it works the opposite way, and is not always [604] created where two currents come together after running in different directions, but currents so meeting would have a tendency to make a rip or swirl of some kind.

Q. I hand you a photograph which is marked De-

(Testimony of T. M. Nelson.)

fendants' Exhibit 2, which has been heretofore introduced in evidence in this case at the former hearing, which purports to be a photograph of the south shore of Sand Island, and ask you to examine it (handing photograph to witness). Now, if that is a correct photograph of the south shore line of Sand Island and if this represents the eastern end of the island, and you are looking at the west, and this represents the western end of that island—

A. Wait a minute, you say that is the east end? (Indicating.)

Q. If this is the east end of the island, and you are out here in a boat, for instance, looking down that way (indicating), and if this further projection which extends further out beyond that is the western end of the island, and these other projections are a part of the shore of the island, then you are mistaken about that being a straight shore line?

A. If this is a true photograph. Is it? You say this is the east end, and that is the west end (indicating)?

Q. That is the way I understand it. Of course, I didn't take the photograph, I assume that the camera told the truth. But, if this is a true photograph representing and picturing the shore line of that island on the south, and if this is the east end and that the west end, and these projections between are part of the shore line, then that is not a straight shore line?

A. No, that is not a straight shore line. What is this supposed to be and represented to be from this

(Testimony of T. M. Nelson.)

point here to here (indicating)?

Q. As I understand, this is the eastern end of the island. This [605] is the shadow or line, here, and the camera must have been placed to the east end of that looking to the west, taking in the shore line on the south of the island. Those further projections, extending furtherest up being the west end of the island, these intermediate projections being other projections from the shore. Now, if that is a picture of the shore line of the island, it is far from being a straight shore, isn't it?

A. Why, sure, it is far from being a straight shore.

Q. Now, if this is a correct representation of that shore line, I will ask you if the ebb tide coming to the westward, where it strikes the eastern end of this island, would not be deflected out into the center of the river by the force of the impact against this end of the island; would it not throw the water out in this way to the southward to the center of the river, southwesterly? A. It does not.

Q. Wouldn't it, if that was the shape of the island?

A. If that is the shape of the island it would be that way.

Q. Then when it strikes the strong current in the center of the river it would throw it back towards the island again? A. No.

Q. Wouldn't that be a physical fact?

A. No, no; it would depend somewhat, when it lies below here, to how the flats and spits and things are situated below the end of it.

Q. If it strikes the current out here it would have

(Testimony of T. M. Nelson.)

no reference to the conditions here? The force of the impact would be to force the water back?

A. That is one way of looking at it. This is ebb tide flowing west.

Q. Yes, going out—flowing out. [606]

A. Well, it is an established fact that when it ebbs out here in the channel, or in this deep water, all the way from three or four or five fathoms of water and up, it flows in along the shore, where there is less water on the flats.

Q. If that represents the south shore line of Sand Island correctly, then you must be mistaken about the water flowing straight along the shore, are you not?

A. No, I am not mistaken.

Q. It could not do it, could it?

A. I think this picture is a mistake.

Q. I don't know about that, but I am assuming that the picture is correct for the purpose of my questions. If that is correct, then the water could not flow straight along that shore, and it would have to strike these points, these projections, and be thrown out of its direct line? A. Not necessarily.

Q. Wouldn't it make a swirl when it struck those points?

A. If the whole body was coming down and striking this point, assuming this thing is right, but I could not picture to my mind like this shows here—if the whole body of water was coming down that way, as you say, it would have a tendency to throw it off that way, but the whole body don't come that way, it is only a small portion.

(Testimony of T. M. Nelson.)

Q. This end of the island divides the tide, and part goes to Baker's Bay and part to the south and west?

A. Yes, it divides the tide, that part is true, but it only divides a small portion of it that flows to the north line of the shore line here.

Q. The greater portion of the water flows to the south of the island?

A. Yes, sir, the greater portion of the water flows to the south of the island. [607]

Q. Then the water in striking the points, such as those projections, as shown by this picture, would necessarily be thrown out of its course and there would be created a swirl, wouldn't there, a whirling motion of the water?

A. Well, it would seem that would be the case, but if so I never saw them.

Q. Well, when you have been there, Mr. Nelson, you were fishing as a drift netter, and you were only interested in the water out in the river where you were fishing; you were not giving particular attention to the action of the water along the shore line, were you? A. Oh, yes.

Q. That was not necessary in the operating of your nets, was it?

A. Yes, it would be, because we would drift up along that island with the flood tide; and I cannot for the life of me see how I could drift around that point there and get into Baker's Bay.

Q. If you set your net further south of that point you would not strike the point?

(Testimony of T. M. Nelson.)

A. I would not set the net, but I would drift with it.

(Witness continuing:)

I have fished with drift nets in Baker's Bay and caught fish there, years ago. This ground is now taken up practically with traps and gill netters do not go in there now. I don't know how it is around the cape, but they do drift around the south of the island.

Q. You say you drift along pretty close to the shore, or just as it suits you. You mean by that, if you want to drift close to shore you direct your boat that way to get it there?

A. No, I would not do that.

Q. What do you mean; you say you drift inshore, or out, as it suits you? [608]

A. The tide might be as the opportunity presented itself for me to put out my net, then I would always get a chance to put it out the way I wanted it.

Q. You put it out a certain way and figure on drifting a certain course? A. Yes, I do that.

Q. If you want to drift inshore you fix it so it will drift inshore? A. Yes, sir.

Q. Ordinarily, you drift outside, drift the main channel of the river? A. No, sir, no.

Q. Now, it is your theory, that a set net must be set in still water in order to fish successfully?

A. Yes, sir.

Q. Now, not having operated a set net but one season, are you prepared to say that your opinion on that subject is conclusive, or of any value?

(Testimony of T. M. Nelson.)

A. Yes, sir.

Q. Where did you operate that one season?

A. On the Cowlitz River.

Q. On the Cowlitz River? A. Yes, sir.

Q. That is on the Washington side?

A. That is on the Washington side, yes, sir.

Q. How far were you from the mouth of the river?

A. Why, I think about a mile.

Q. A mile? A. Yes, sir, about a mile.

Q. The Cowlitz has a very swift current, hasn't it?

A. Yes, when there is a freshet the current is pretty swift.

Q. You had no moderate currents on that river?

[609]

A. We had two spots where there was a moderate current.

Q. How did you find a place to operate a set net at all on that river?

A. There was a small stream called the Coweman, and it confluences with the Cowlitz River, makes two small eddies.

Q. There was where you operated?

A. We operated two nets in them little eddies.

Q. Did anybody else operate set nets on the Cowlitz River? A. They did further up.

Q. Did they operate in the current?

A. I don't know what they operated on.

Q. You do not know where they were?

A. No, sir.

Q. Now, have you never heard of set nets being operated anywhere in a current? A. No, sir.

(Testimony of T. M. Nelson.)

Q. You do not know that has been done successfully, do you?

A. We tried it on the Cowlitz; our own experience there was to try it.

Q. It happened that you did not succeed, but you do not know that others have not succeeded, do you?

A. I know of none that has tried it and not succeeded; I have in a way tried it myself on the Columbia River and did not succeed, but it was in a way where I was doing it to catch the fish for home use and not for commercial purposes.

(Witness continuing:)

Peacock Spit is south of Sand Island some considerable distance below the west end. I should say the upper end of it would probably be a couple of miles distant west therefrom—west of the "Republic" wreck. There is a period at slack water time when the current is not strong south of Sand Island, and if [610] a set net was across the river at that time of day it could catch fish if they were out at that moment of slack tide, if they were setting there and had gone through the period of strong tide they would be so jumbled together they could not catch any fish, and they could not so set without jumbling together; you could not put anything on them to hold them; they could not be anchored so they would not tangle together. The same theory would hold good on a short net as on a long one, only not quite so much. Set across the current, a short net, say four or five fathoms long, it would have a better chance

(Testimony of T. M. Nelson.)

than one fifteen or twenty or thirty or more fathoms long.

The place where I operated set nets on the Cowlitz River was affected by the tides. There is quite a little flood there. I was located at the confluence of the Coweman and that is as far as I went up.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The period of slack water off the south shore of Sand Island in that vicinity, I should say lasts from five minutes to twenty minutes, and during that period if set nets were put in there, the length of ten or fifteen fathoms, you might, perhaps, catch some fish, if any fish happened around at that time—there at that very time, and laid in shape. But you would have to take the fish out immediately, otherwise the tide would carry them out. The strong ebb tide would bury the net under water and the fish would tear out. It would only take a few minutes to lay out a set net there, if you had everything ready, but it would require two men to do it, but if a net were set out there in slack water it would hold there just as long as the slack period lasted, which would be five to twenty minutes, and the [611] fish would have to be taken right out; if not, they would be lost.

[Testimony of R. A. Hawkins, for Plaintiff (Recalled).]

R. A. HAWKINS, a witness heretofore produced on behalf of the plaintiff, was recalled and testified in response to interrogatories propounded to him by respective counsel, as follows:

(Testimony of R. A. Hawkins.)

(Interrogated by Mr. FULTON.)

I heard the testimony of Mr. McGowan describing the Brumbach location of Sand Island. I am acquainted with the Brumbach location. I was over there off and on; about as familiar then as I am now. I know reasonably—pretty close to the extent of his location. I think he, Mr. McGowan, purchased from Brumbach—he bought two or three mules and two or three old seines and a little piece of ground there; I would not think it would exceed 1,800 feet. Brumbach's outfit was practically a hand seine. He used to pull in his head line with one horse, one mule. I do not think his seine was over 50 or 60 fathoms, maybe 70, in length. Stensman never had any fishing gear there.

The mesh of gill nets are about nine and one-fourth inches. The gill nets catch, as a rule, fish from about twelve pounds up.

During the years 1908, 1909 and 1910, the plaintiff operated on Sites 2 and 3. The proportion of the catch of salmon on those grounds was substantially twenty to twenty-five per cent under twelve pounds. The size of the seine meshes were from three and a half to five inches. I know of my own knowledge that the plaintiff, taking the three years together—1908, 1909 and 1910, when it operated these Sites 2 and 3, broke just about even. I do not think it made any money. [612]

Cross-examination.

(Interrogated by Mr. HADLEY.)

The meshes of a gill net are nine and one-fourth

(Testimony of R. A. Hawkins.)

inches. They knit it on a mesh board—they put it on a mesh board and they measure nine and one-fourth inches, that will go around the mesh board; that will make it square. It is not exactly square. It is about what you might call diamond shape, the meshes draw out to a diamond shape, but not an exact diamond shape, but something like that. The meshes of a drag net are about three and a half to five inches.

During 1908 the plaintiff caught on the sites in question somewhere around 150 tons of fish, and in 1909 we caught 104 tons, I think, somewhere around there. In 1910 we caught about 135 tons, somewhere around there, and I think with that catch the plaintiff just about broke even. I could not tell you the amount of fish the plaintiff caught on the two grounds during the year 1911, because the plaintiff fished Site No. 1 with Sites 2 and 3. All three grounds were fished together. 1911 was a little better year than the previous years. In my judgment it was considerably better. We employed about fifty-five men in the operation of our drag seines there, somewhere around there, during the whole season. We also had launches and horses. The expense of operating a drag seine is considerable. I should say that the expense of operating the drag seines there during each of those years was about $220 a day, something like that. I do not know what would be the operating expenses of set nets there. I don't know how extensive they would go at it. They would have a whole lot of expense if they tried to keep them in. The ordinary operation of set nets

(Testimony of R. A. Hawkins.)

entails comparatively small expense where they are set in eddies. It doesn't take much to get them there. The entire catch of salmon by the Columbia River Packers' Association in front of the three sites for the year 1911 was [613] about 390 tons, I think; somewhere around there.

Redirect Examination.

(Interrogated by Mr. FULTON.)

I know what the catch of salmon fish in front of Site No. 1 was in 1908. I think it was 55 tons, something like that. In 1909 it was close to 40 tons, and in 1910 it was 154 tons.

Recross-examination.

(Interrogated by Mr. HADLEY.)

The Columbia River Packers' Association did not operate seines in front of Site No. 1 in 1908, 1909, or 1910. We never had any particular arrangements with the operators there. I just let them put their nets out in front of Site No. 2. There is no other way of fishing in front of Site No. 1. They are required to place their seine out in front of Site No. 2 and then make the landing on Site No. 1.

Q. Then, isn't it true that the fish you say were caught on Site No. 1 actually were taken from in front of Site No. 2?

A. No, he didn't have a chance to fish No. 2; No. 2 was 3500 feet long.

Q. He set his net in front of it?

A. He did not fish it; he fished No. 1.

Q. Didn't he drag No. 2.

(Testimony of R. A. Hawkins.)

A. He drags No. 1; sets his net in front of No. 2 and drags No. 1.

Q. If he sets in front of 2 he must drag No. 2?

A. He didn't go up on No. 2, fishes down on No. 1.

Q. If he sets in front of 2 and lands on No. 1, he must drag on No. 2? [614]

A. I gave him the privilege of fishing above the "Republic."

Q. There are fish there?

A. There are fish there; there are fish all over the ground.

Q. He drags a seine in front of No. 2 and he caught the fish that were there?

A. He drags his seine over No. 1, and can drag his fish on No. 2.

Q. If he set his seine in front of Site No. 2 and then dragged it down so as to land on Site No. 1, wasn't he getting fish in front of No. 2; he was simply dragging his fish out on the shore of No. 1?

A. He had no ground to fish on No. 2, practically. The "Republic" is there and he cannot get up on No. 2.

Q. How far above the west line of No. 2 did he set his seines?

A. He would go up on No. 2 three or four hundred feet, and half of the time never got on No. 2 at all. He had short seines and did not bother it.

Q. If he went three or four hundred feet above the west line of No. 2, he dragged down, and where did he land on No. 1?

A. He landed down on No. 1.

(Testimony of R. A. Hawkins.)

Q. How near the east line of No. 1?

A. He would go quite a ways down, he would go away down as far as the breakers would let him go.

Q. How far would that be?

A. That would be eight or nine hundred feet, or a thousand or fifteen hundred feet.

Q. Did he customarily land that far around on the east line of No. 1?

A. Pretty near all the time, yes, sir.

Q. Then, when you estimate the number of fish that were caught in front of Site No. 1, you were counting on the fish that were taken by the drags where the dragging was made on No. 2? [615]

A. I don't know what fish he caught on No. 2; he could not catch any on No. 2, hardly.

Q. Isn't that true, you were counting the fish that were landed on Site No. 1?

A. How do you mean?

Q. In making this estimate of the catch for those years, you are counting the number of fish that were landed on Site No. 1?

A. Why, sure, those fish—that is, they were caught on No. 1 ground, never caught on No. 2, because we fished No. 2.

Q. You say they were caught on No. 1 because they were landed on No. 1?

A. They were all landed on No. 1, but he fished his No. 1.

Q. How could that part be, when you fished on No. 1, you actually dragged in your net on front of No. 2?

(Testimony of R. A. Hawkins.)

A. You have to lay out in front of somebody's ground.

Q. Now, the truth is, he must have caught some fish in front of No. 2?

A. Probably he did get a few fish in front of No. 2, could not get many; we had a little experience; I stopped them for over a week from fishing, and he done just as well, if not better with his short seine.

Q. What is the width of Site No. 2?

A. Thirty-five hundred feet.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The plaintiff operated Site No. 1 during the year 1911 under a lease from the Government.

Mr. FULTON.—We have the lease. I would like to ask that the lease go in evidence with the privilege of substituting a copy. **[616]**

Mr. WELSH.—The lease from the Government commencing the year 1911?

Mr. FULTON.—Yes.

Mr. WELSH.—All right.

Stipulation [As to Leasing of Sites Nos. 1, 2 and 3].

It is agreed between the parties hereto that the United States, through its War Department, on the 28th day of March, 1911, leased to the Columbia River Packers' Association, for the term of three years, commencing on the 1st day of May, 1911, and terminating on the 30th day of October, 1914, Sites Nos. 1, 2 and 3, accordingly as marked and delineated on the map offered in evidence before the Master, marked Defendants' Exhibit "F," and is properly

described on said Exhibit "F." The lease is practically a copy of the said original lease which the plaintiff offered in evidence heretofore.

Thereupon, the plaintiff rested.

The defendants for their rebuttal then called the following witnesses:

[Testimony of H. S. McGowan, for Defendants (Recalled in Rebuttal).]

H. S. McGOWAN, a witness on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:
(Interrogated by Mr. WELSH.)

I heard the testimony with reference to the fact that set nets could not be operated in anything but eddies or still waters. The fact is, an eddy is not necessary for set nets, you can operate them anywhere you feel so disposed. I know of places where they are operated and they are not in an eddy. I have [617] particularly in mind North River on the Willapa Harbor, where I have been quite familiar with the method of fishing. It is a river where the tide ebbs and flows and its average rise and fall is about the same as it is on the Columbia River. Set nets are successfully operated for the purpose of catching salmon fish in the North River. They are operated there in all kinds of water, in tide water and even further up stream, what they call the low high water. The tide, however, is not extensive, but further down the river they operated a great many of them in tide waters where they had each day an ebb and flood, the same as it is on the lower Columbia River, and they are fished successfully and salmon

(Testimony of H. S. McGowan.)

fish are caught therein.

Q. You heard Mr. Hawkins testify that Stensman owned no fishing location on the south shore of Sand Island or the waters south of Sand Island. You can tell us the facts with reference to that.

Mr. FULTON.—I object to that as not proper rebuttal. In fact, I don't think anything you have offered here is rebuttal testimony. It is part of your original case. I move to strike out all the testimony of Mr. McGowan on the ground it is not rebuttal evidence.

A. Stensman did own a fishing right. I don't remember just how long they had their rights there, but they had them there in running for about 1904 and 1905, I should say up to 1908, I believe. Mr. Reischman, or Reischman Brothers, owned fishing rights down there from about 1903 or 1904, I should say, until 1905, or thereabouts. These grounds were close to the Brumbach grounds just westerly of the "Republic" wreck and extending on downward to the ground now covered by Site No. 1.

Q. You succeeded to the interest in the locations of Brumbach, Reischman Brothers and Stensman, is that correct? [618]

To this question counsel for the plaintiff objected upon the ground that it was incompetent.

A. Yes, sir.

Cross-examination.

(Interrogated by Mr. FULTON.)

Brumbach had a seine—called it a seining ground. He had a fishery right there upon which he operated

(Testimony of H. S. McGowan.)

drag seines. He located it, that is the way the fishermen term it. He located a fishery there that no one else was using at the time he took out a license there and operated. He took out his license in Washington, and entered into the possession of this fishery and claimed it and also exercised the right and fished there. His right as I understand it, existed in fishing, taking up and establishing the location—taking out a license for that place and then operating there, seining. That is all that I know he had. I don't know how he located, I didn't ask him. I was not there when he located it. He located it and took me and showed me where the delineations of his line ran that he had located. He showed me where the lines crossed in the water and showed me the marks that he had on the shore that he went by. This was upon Sand Island and on land owned by the Government, and the Court says that it is in the State of Oregon. It was not known at that time to belong to the State of Oregon. It was a long time before it was established. Of course Brumbach had a license issued by the State of Washington, because he supposed he was in Washington, and he went over there and located it and operated this fishery. It was subsequently determined that the territory was in Oregon. I bought all the right that Brumbach had there. What I have said in regard to Brumbach's rights pertains both to Reischman and Stensman. I presume they acquired their rights the [619] same way.

(Testimony of H. S. McGowan.)

Redirect Examination.

(Interrogated by Mr. WELSH.)

I don't know whether the plaintiff in the complaint filed herein made any allegation as to where Sand Island was, but they alleged the locality in controversy to be in the State of Washington, as I remember. Up to the time the United States Supreme Court in the case entitled "State of Washington vs. the State of Oregon" decided that Sand Island and the *locus in quo* was situated in the State of Oregon, Sand Island was believed to be by the public in general in the State of Washington, and the Oregon authorities recognized Washington licenses when being operated in the waters of the Columbia River south of Sand Island. At all times up to the decision of the United States Supreme Court in the case above mentioned, people generally, in fact everybody, believed this location to be in the State of Washington.

[Testimony of Ralph Grable, for Defendants (Recalled in Rebuttal).]

RALPH GRABLE, a witness on behalf of the defendants was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

Q. Mr. Grable, there is some testimony here that in order to operate a set net for the purpose of catching salmon fish that it is necessary to put it in eddy waters—quiet waters. Tell us the facts with reference to that.

Mr. FULTON.—I object to that as not proper rebuttal testimony. [620]

(Testimony of Ralph Grable.)

A. Why, I will explain, as my experience in fishing set nets I never have fished a set net in an eddy; that is considered by a fisherman that an eddy is the best place to fish a set net. I never have fished a set net in that condition.

I would say that an eddy was the best place, but in my experience in fishing, I have fished in straight current, with the set net standing straight up and down the current.

Q. With what result?

A. With the best results.

Q. What in your opinion, from your knowledge and experience as a fisherman—from your knowledge as a fisherman and the experience you have had as a fisherman, state whether or not it is necessary to have set nets placed in eddy waters in order to successfully catch fish?

Mr. FULTON.—We object to that.

A. No, sir, we don't prefer that kind of water at all. If we have a ground where the fish run we prefer to set our nets lengthwise in the current, no matter how strong, there is always slack water in any river in the world between high and low tide; and when slack water comes the fish run to and from the shore. They don't run up and down the river. In my estimation they run simply across and hunt for the deep water, for the fish is here and there; he runs backwards and forwards, not up and down as some people suppose they do; he runs backwards and forwards. Suppose the river ran east and west—suppose the river ran east and west, when slack water

(Testimony of Ralph Grable.)

comes a salmon is going to go north and south, from one shore to the other until he finds the current. That is my estimation of the fish.

(Witness continuing:)

I have operated set nets in the Nasel River. I fish [621] there every winter with set nets. That is my winter business, setting nets on the Nasel River, and the water where I have my set nets is very swift water, I would say, and I have had what I call success, because I made a living out of it, and I suppose that is a successful business. My nets caught fish and they were successfully operated in very swift water.

Thereupon, this witness prepared a map which was offered in evidence before the Master and marked Defendants' Exhibit "G," and is hereunto attached and so marked, which is a correct map of Sand Island that the different points thereon indicated.

Q. What effect does the shape of the southern shore of the island have upon the creation or non-creation of eddies and eddy waters?

To this question counsel for the plaintiff objected upon the ground that it was not proper rebuttal; the witness having been examined on this point in his original examination.

A. Why, when the current is so strong between any point in any river wherever I have been, wherever there was a by-way formed by two different points, that the current slackened between these two points. I will go in this by-way in order to get out of a strong

(Testimony of Ralph Grable.)

current, wouldn't I? That is my experience.

(Witness continuing:)

For twenty-five years I have fished on the Columbia River and when I want to go against the current I will go as near Sand Island as possible, because I want to get out of the current; it is a strong eddy between those two points. The south end of Sand Island and the north end of Sand Island is pretty [622] near it, but here we have the eastern and western end of Sand Island.

Cross-examination.

(Interrogated by Mr. FULTON.)

Q. How many drinks have you had this afternoon?

A. (Witness hesitates.)

Mr. WELSH.—If you had any, tell him.

A. I had a glass of water, but not a drink of whiskey.

(Witness continuing:)

I drank no liquors to-day at all. I am perfectly sober. I had a drink before breakfast this morning but haven't had any since. I had a glass of water. I have probably had two glasses of beer to-day since breakfast, but no more.

[Testimony of Amon Markham, for Defendants (Recalled in Rebuttal).]

AMON MARKHAM, a witness heretofore produced on behalf of the defendants, was recalled and in answer to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. WELSH.)

I certainly have had a great deal of experience in

(Testimony of Amon Markham.)

operating set nets in the waters of the Nasel River. The Nasel River is a tidal stream where the tide ebbs and flows and has a very strong current.

Q. You may state *where* or not it is absolutely necessary for the successful operation of set nets, to have them in eddy waters?

To this question counsel for the plaintiff objected upon the ground that it was not proper rebuttal. **[623—625]**

A. Why, I have operated set nets from start to finish in the Nasel River, all in the current, and they can be successfully operated there.

(Here witness was handed Defendants' Exhibit "G" and was asked whether or not that was the correct representation of the southern shore and general appearance of Sand Island.)

A. Why, it is a very good map, only he has not included the fact that this is narrow here.

(Witness continuing:)

I know it is practically correct because it shows the southern shore to be of crescent shape. I would say that map was a very good map of the southern shore of the island, but the little point at the east end of the island should be narrow. I have seen this island many times during the last thirty-four years. I was raised and born right there, you might say. I was deputy sheriff of Pacific County at one time.

Cross-examination.

(By Mr. FULTON.)

Nasel River does not flow into the Columbia River, it flows into Willapa Harbor, about twenty-eight

(Testimony of Amon Markham.)

miles from the Columbia River. I fished for myself and owned the set net myself.

Q. What was your biggest catch per season ever made in a set net on the Nasel River?

A. That is a question I could not answer.

Q. Did you ever catch over a ton?

A. I should say I could.

Q. Did you ever catch a ton?

A. Not at one time.

Q. I mean in one season. A. Why, sure.

Q. How much did you ever catch, your best season's catch, with a set net on the Nasel River?

[626]

A. Well, now, I would have to go back and hunt up my receipts to find out exactly.

Q. I don't ask you exactly.

Mr. WELSH.—Q. Tell the best you can remember.

A. Why, in the neighborhood of four tons. I am not going to go until I get my receipts.

Q. How long ago was that? A. Two years ago.

Q. That you got four tons? A. Yes, sir.

Q. How many set nets did it take to catch four tons?

A. We operated about three, I think, once.

Q. Out of three set nets on the Nasel River two years ago you secured four tons of fish?

A. Yes, sir.

Q. That is the best you ever did?

A. Well, now, do you want me to go to work and exemplify the fish we did catch?

(Testimony of Amon Markham.)

Q. Answer the question. A. Four tons.

Q. That is the best you ever did? A. Yes, sir.

Q. That was in the Nasel River?

A. In the Nasel River.

Q. How did you lay out your nets?

A. That is our business.

Mr. WELSH.—You can tell him, Mr. Markham.

A. We put them on the sticks.

Mr. FULTON.—Q. How much whiskey have you been drinking?

A. Not as much as you have, in all probability.

Q. About how many drinks did you take to-day?

A. I had a drink of whiskey this morning. **[627]**

Q. Did you say you had a drink with me this morning? A. No, sir.

Q. You had a drink of whiskey this morning?

A. Yes, sir.

Q. How many drinks have you had?

A. One drink of whiskey.

Q. What have you been drinking?

A. Nothing at all.

Q. Haven't been drinking any intoxicating liquors?

A. Not on your life. I had a drink of whiskey this morning before I went to breakfast.

(Witness continuing:)

We put out set nets in the river on sticks across the current. We also fished with the current. We had two different ways. Two of our nets were set across the current, and one was set up and down with the current. The fishing was done all in the night-

(Testimony of Amon Markham.)

time. We took the fish out at any tide, either high tide or low tide.

Redirect Examination.

(Interrogated by Mr. WELSH.)

The set nets that we operated on the Nasel River were from twenty-two to twenty-eight fathoms in length.

[Testimony of Moses Hirschy, for Defendants (Recalled in Rebuttal).]

MOSES HIRSCHY, a witness heretofore produced on behalf of the defendants, was recalled and in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. WELSH.)

I have worked on Sand Island since the year 1903, and **[628]** worked about four years fishing for the plaintiff on Sand Island. In my judgment, Defendants' Exhibit "G" is substantially correct as to the shape of Sand Island, about as near as I would know, and in my judgment is a correct representation of the southern shore of the island, and I think it correctly represents the island as near as I would know.

(Defendants' Exhibit "F" was exhibited to this witness and by him identified.)

Q. That (referring to Defendants' Exhibit "F") correctly represents the shore of the island, doesn't it?

A. It looks pretty reasonable, only of course it don't come out just with that drawing exactly, but

(Testimony of Moses Hirschy.)

then that is not drawn just right, I don't see that he drew it just right.

Q. That shows how the shore runs on the south side (referring to Defendants' Exhibit "F")?

A. It looks right to me. I think this map correctly shows the south shore of the island.

Redirect Examination.

(Interrogated by Mr. WELSH.)

Q. As a matter of fact, counsel has taken the position with you that this map was made to represent Sand Island, whereas I am taking the position with you that the topography of the island is not correctly given here, and I want to know.

A. I will consider that.

Q. I want to know whether or not the southern shore of Sand Island, as actually on the ground, is not indented and more concave than this plat shows it to be? [629]

Mr. FULTON.—I object to this as leading and suggestive and stating to the witness primarily what the counsel very much desires he should testify to.

A. I don't want to say any more than I know in this case, because there might be such a thing that I don't understand.

Q. What I want to know about Sand Island, does it concave—does it go in further, little indentation and bays in it?

A. Sure, I know that sometimes we have trouble to get around, it is not just straight; it is concave some, yes. But then, I could not call it straight, the

(Testimony of Moses Hirschy.)

way I find it, when you seine and hook on teams, whenever you come down the stream you go along nicely and then get to a curve and it takes another four horses to make up coming around the point. It is not just straight; I could not call that straight.

Mr. FULTON.—Q. Have you any idea of what concave means—on the square?

A. Concave—I am not using these high words, and I would know a point in and out. I know what a crook is; I am not using these high words.

Q. (By Mr. FULTON.) Do you see any "crooks" around here?

A. Well, I guess when it comes to that business—

Mr. WELSH.—Q. Is there a crook on the southern shore of the island?

A. There is crooks along the island, certainly.

Mr. FULTON.—Q. That is, there were some crooks when you were there?

A. I guess there were some crooks when I was not there; maybe crooks when I am there too, yes. **[630]**

[Order Approving Condensed Statement of Testimony and Evidence.]

The above and foregoing condensed statement of the testimony and evidence taken and admitted at the trial of the above-entitled cause for use on the appeal herein, together with the exhibits therein referred to and hereunto attached, was duly presented to the undersigned, Judge of the above-entitled court, before whom said cause was tried, and the

same has been duly examined and found to be a true, complete and properly prepared condensed statement of all the testimony and evidence offered, taken and admitted on the trial of said cause, and the same is hereby, in all respects, approved, this 3 day of December, 1913.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. **[631]**

Plaintiff's Exhibit "E."

KNOW ALL MEN BY THESE PRESENTS, That an Act of Congress approved July 28, 1892, provides as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress; *Provided,* That nothing in this act contained shall be held to apply to mineral or phosphate lands."

And, Whereas, by order of the President of the United States dated August 29, 1863, all of the land known as Sand Island in the Estuary of the Columbia River, Oregon and Washington, was set apart for public uses as a Military Reservation;

And, Whereas, the land above described is now unoccupied and unproductive property under the control of the Secretary of War and is advertised for lease by authority of the Secretary of War dated February 10, 1905;

And, Whereas, the Columbia River Packers' Ass'n, of Astoria, Oregon, was the highest bidder for lease of Sites Nos. 2 and 3, and has applied for a lease thereof for a term of three (3) years.

NOW, THEREFORE, This agreement made on this 1st day of May, 1908, by and between Lieut. Col. S. W. Roessler, Corps of Engineers, U. S. Army, on behalf of the United States, of the first part, and the said Columbia River Packers' Ass'n, of the second part, WITNESSETH, That the said party of the first part for and in consideration of the rents, covenants and agreements hereinafter mentioned, does, for himself and his successors in office, hereby covenant and agree with the said party of the second **[632]** part, its executors, administrators and assigns, to let and lease, and does hereby let and lease, unto the said party of the second part, its executors, administrators and assigns, the parcel of land on Sand Island, and shown on the attached maps as Sites Nos. 2 and 3.

TO HAVE AND TO HOLD, The said premises with all the rights, easements and appurtenances

thereto belonging, for the term of three (3) years commencing on the 1st day of May, 1908, and terminating on the 30th day of April, 1911, subject to the following named conditions:

That the lessee file a bond acceptable to the United States in a sum equal in amount to the annual rental for the faithful performance of all obligations herein provided;

That this lease shall be subject to revocation by the Secretary of War, at his discretion, upon two (2) months' notice to the party of the second part, at any time prior to the expiration of the term of three (3) years for which it is made, unless sooner revoked for cause as hereinafter provided;

That all buildings or structures of any kind which may be erected by the lessee, its executors, administrators and assigns, during the said term of three (3) years, either upon the grounds leased or in the waters in front thereof, shall be removed on or before the date of the expiration of this lease, or within two (2) months from the date of the receipt of notice of revocation above provided for;

No excavations, other than for building purposes, shall be made, and no soil, shall be removed from the sites hereinbefore referred to;

That the said Columbia River Packers' Ass'n, its executors, administrators and assigns, shall pay for the use of the sites **[633]** herein leased the sum of Fifty-one Hundred Seventy-five (5175) dollars per annum, payment to be made in advance on the first day of May of each year during the life of this lease, to the Engineer Officer in charge of the river

and harbor district in which the land is located;

That the party of the second part will be allowed to erect such temporary structures for the housing of its employees, animals, etc., as may be necessary, with the understanding that any and all such structures must be entirely removed, at its own expense, on or before the date of expiration of its lease, or after two (2) months' notice of revocation, and with the further understanding that the number of such structures, location and dimensions shall be satisfactory to the party of the first part, and receive prior approval;

The grounds and adjacent waters must be left in as good condition as when occupied by the lessee, its executors, administrators and assigns. All buildings or structures not thus removed within the limit of time mentioned shall become the property of the United States;

That no structure not absolutely needed in connection with seining operations will be permitted to be erected on the site;

That no disreputable or disorderly persons will be housed on the leased land by the party of the second part;

That it must confine itself to the limits of its leased ground and it and its employees will avoid any action that may cause friction or trouble with the adjoining lessee or his employees.

Infraction of any of these conditions will be considered sufficient ground for immediate revocation of this lease.

The default of payment of annual rental for one

month from [634] the date upon which it becomes due, as stated herein, shall be deemed sufficient cause for enforcing the collection thereof from the bondsmen.

That if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its executors, administrators and assigns, to be paid, kept, and performed, then and from thenceforth it may and shall be lawful for the said party of the first part, or his successors in office, to re-enter into and upon the said leased premises, and every part thereof.

And the said party of the second part for itself, its executors, administrators and assigns, does hereby covenant and agree with the party of the first part, and his successors in office, to hire, and lease the said premises herein described, with the rights, easements, and appurtenances thereunto belonging, on the conditions named herein, and for the period herein specified.

And the said party of the second part, for itself, its executors, administrators and assigns, further covenants and agrees with the party of the first part and his successors in office, that on the last day of the term of this lease, or if it is otherwise revoked, as herein provided for, said party of the second part, its executors, administrators and assigns, shall and will, peaceably and quietly lease, surrender and yield up unto the said party of the first part, or his successors in office, all and singular the said leased premises at the site hereinbefore referred to.

It is further understood and agreed that this lease

is subject to and shall not become operative or binding until it has received the approval of the Chief of Engineers, United States [635] Army.

IN WITNESS WHEREOF, The said party of the first part and the said party of the second part have hereunto set their hands and seals this 1st day of May, 1908.

Witnesses:

A. L. UPSON as to

S. W. ROESSLER, [Seal]
Lt. Col. Corps of Engineers.

Attest: as to

COLUMBIA RIVER PACKERS' ASSOCIATION.

S. ELMORE,
Vice-president.

GEO. H. GEORGE, Secretary.

[Seal of Columbia River Packers' Association.]

[Executed in duplicate.]

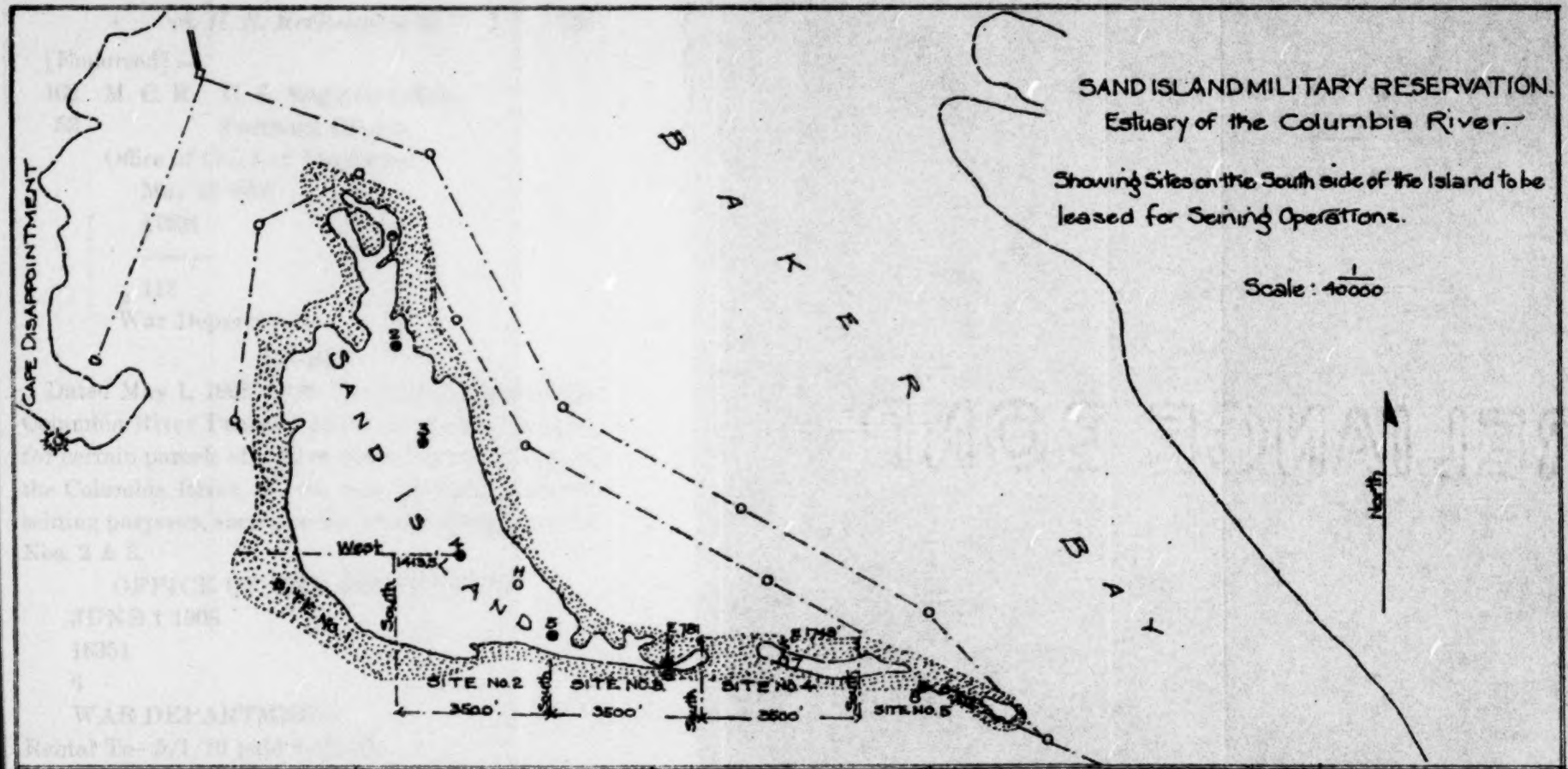
Approved: May 29, 1908.

SMITH S. LOUD (?)
Acting Chief of Engineers.

War Department, June 3, 1908.

Approved:

ROBERT SHAW OLIVER,
Assistant Secretary of War. [636]



SITE Nº 1.	SITE Nº 2.	SITE Nº 3.	SITE Nº 4.	SITE Nº 5.
The North boundary is marked by a line drawn due West from U.S. Monument Nº 4 to the intersection with the low water line. The East boundary is marked by a line due South from a point 1413.5 feet due West of U.S. Monument Nº 4 to the intersection with low water line. The length of low water shore line available is approximately 4000 feet.	The West boundary corresponds with East boundary of Site Nº 1. East boundary is marked by a line due South from U.S. Monument Nº 5 to low water line. Length of shore line approximately 3500 feet.	The West boundary corresponds with East boundary of Site Nº 2. East boundary is marked by a line due South to low water, from a point 781 feet due East of U.S. Monument Nº 6. Length of shore line approximately 3500 feet.	The West boundary corresponds with East boundary of Site Nº 3. East boundary is marked by a line due South to low water, from a point 1749 feet East of U.S. Monument Nº 7. Length of shore line approximately 3500 feet.	The West boundary corresponds with East boundary of Site Nº 4. East boundary is marked by a line extended 37° E. from U.S. Monument Nº 8, to low water of the East end of Sand Island. length of shore line approximately 3400 feet.

U.S. ENGINEER OFFICE.
PORTLAND, OR. FEB. 1908
A.H.

TRAPS 51
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[Endorsed]:—

162 M. C. R. U. S. Engineer Office.
53 Portland, Oregon.

Office of Chief of Engineers.
May 12 1908
41831

113

War Department.

LEASE.

Dated May 1, 1908, from the United States to the Columbia River Packers' Ass'n. of Astoria, Oregon, for certain parcels of land on Sand Island, estuary of the Columbia River, for the term of three years for seining purposes, shown on the attached map as Sites Nos. 2 & 3.

OFFICE OF THE SECRETARY
JUNE 1 1908
16351
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WAR DEPARTMENT.

Rental To– 5/1/10 paid 4/28/09.

Pltffs Ex E.

9/15/10 C. D. Savery, Exr. [637]

In the District Court of the United States for the Western District of Washington, Southern Division.

IN EQUITY—No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Defendants.

Petition for Appeal and Order Thereon.

To the Honorable EDWARD E. CUSHMAN, Judge of the Above-entitled Court:

Your petitioner, Columbia River Packers' Association, the plaintiff in the above-entitled cause, conceiving itself *grieved* by the judgment and decree rendered and entered in the above-entitled court in the above-entitled cause, on the 22d day of September, A. D. 1913, and believing that said judgment and decree is greatly to its prejudice and injury and is erroneous and inequitable, does hereby appeal from said judgment and decree, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenti-

cated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

G. C. FULTON,
Attorney for Plaintiff.

The foregoing petition for appeal is hereby granted and allowed and the claim of appeal therein made is hereby allowed, and the amount of the bond on said appeal and to supersede and [638] stay proceedings on said judgment and decree appealed from is hereby fixed at the sum of Twenty-five Thousand Dollars ($25,000.00).

Dated this 3 day of December, A. D. 1913.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [639]

In the District Court of the United States, for the Western District of Washington, Southern Division.

IN EQUITY—No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Defendants.

Assignments of Error.

The plaintiff makes the following Assignments of Error, which it avers occurred at the trial of the above-entitled cause, and prays for reversal of the decree in the above-entitled court in said cause and for a decree and judgment as prayed for by it in its amended complaint:

I.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant H. S. McGowan filed herein.

II.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant Erick Lindstrom filed herein.

III.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant J. P. Coyle filed herein.

IV.

The Court erred in not sustaining the petition and motion of plaintiff filed herein June 4, 1909, to dismiss this suit, and [640] erred in refusing to dismiss this suit, and not granting such petition and motion.

V.

The Court erred in holding, adjudging and decreeing that it had jurisdiction of the cause of suit set forth in plaintiff's amended complaint upon the showing made by the plaintiff in its petition and motion to dismiss said suit.

VI.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of the defendant H. S. McGowan.

VII.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of defendant Erick Lindstrom.

VIII.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of defendant J. P. Coyle.

IX.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit herein.

X.

The Court erred in rendering and entering the decree of February 5, 1912, wherein and whereby it was adjudged and decreed that plaintiff should take nothing by this suit, and that the temporary injunction and restraining order theretofore issued against the defendants herein should be dissolved and vacated, and in dissolving and vacating such restraining order; and in holding, adjudging and decreeing that the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle were, or either was, at the time of the [641] commencement of this suit, and ever since had been and were until the expiration of the said

current fishing year, entitled to the exclusive right, or any right, to the exclusive or any use or occupation of the fisheries and fishing grounds described in the cross-bills of defendants herein, by the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, and their servants, and persons claiming by, through or under either of them, of the fisheries and fishing locations involved in this suit, and from asserting any dominion or right of possession or use of said fisheries or fishing grounds by virtue of any leasehold interest of the shore or tide lands abutting thereon, or adjacent thereto, or by reason of any fishing license or franchise which plaintiff may hold or possess.

XI.

The Court erred in its decree of February 5, 1912, referring this cause to the Honorable M. A. Langhorne, a Commissioner of this court, as Master *pro hac vice* to ascertain and report to this court the amount of damages suffered by the defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of their said fisheries from and after the 7th day of July, 1912, up to and until the date of said decree, or at any time, and in permitting the said defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle to offer and in receiving further testimony and evidence in said cause on said question of damages before such Master.

XII.

The Court erred in rendering and entering said decree of February 5, 1912, and each and every part thereof, and not granting the plaintiff a decree ac-

cordingly as prayed for in its amended complaint. [642]

XIII.

The Court erred in holding, adjudging and decreeing that plaintiff was not entitled to the free and unobstructed ingress to and egress from the shore to Sites numbered Two (2) and Three (3) described in plaintiff's amended complaint; and in adjudging and decreeing that defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, at any time had any right to construct, erect or maintain in front of the shore of said Sites 2 and 3 in plaintiff's amended complaint described between the line of low-water mark and line of navigability of the Columbia River any set net locations for catching salmon fish, or any permanent or fixed buoys or anchors, or any fixed appliance or appliances for the operation of any set net or set nets for taking salmon fish, or otherwise.

XIV.

The Court erred in holding, adjudging and decreeing that the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, were, or either was, entitled to construct, erect or maintain in the waters fronting the shore to said Sites numbered 2 and 3 described in plaintiff's amended complaint, between the line of low-water mark thereof and the line of navigability, in the channel of the Columbia River, any fixed structure or appliance, or any set net location, for operating set nets for taking salmon fish, or otherwise, or any fixed appliance which in any manner interfered with plaintiff's free ingress to and

egress from the shore to said sites, or which in any manner interfered with, or which prohibited plaintiff from navigating the waters in front of said shore by boats or seines, or which interfered with or prevented plaintiff from landing seines on such shores from the waters fronting thereon. **[643]**

XV.

The Court erred in holding, adjudging and decreeing that under the laws of the State of Oregon the owner of the shore of a navigable water therein does not have as an appurtenant thereto the right to the free and uninterrupted ingress to and egress from such shore, to the navigable waters fronting thereon.

XVI.

The Court erred in holding, adjudging and decreeing that under the laws of the State of Oregon a citizen of the State of Washington, without right, title or authority, other than a license issued by the Fish Commissioner of the State of Washington, to operate a fixed appliance for taking salmon fish in the waters of the Columbia River, is by such license alone entitled of right to construct, erect and maintain in the waters of such river, lying exclusively and wholly within the territorial boundaries of the State of Oregon, in front of shore lands there owned by citizens of Oregon, fixed fishing appliances for taking salmon fish, against the objection, protest and consent of such owner, whereby such shore owner against his protest and consent is deprived of access to such shore; and in further adjudging and decreeing that any interference by such shore owner of a structure so placed is unlawful and a tort, entitling the owner of such ap-

pliance to damages; and in further holding, adjudging and decreeing that the measure of such damage is determinable by the number of fish caught by seines operated from such shore when the appliances sought to be operated there were set nets.

XVII.

The Court erred in not sustaining the exceptions of plaintiff, and each thereof, to the Findings of Facts and Conclusions of Law made and filed by M. A. Langhorne, Special Master [644] appointed by this Court, to determine the amount of damages to be assessed against plaintiff herein, and in affirming and approving such findings of facts and conclusions of law, and each thereof and entering a judgment and decree thereon.

XVIII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. I found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

> "The long established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season. When the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-

half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch."

The Court also erred in approving such finding.

XIX.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. II, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"Under the rule for fixing the rental value of fishing locations upon the Columbia River as set forth in Finding of Fact No. I, it is impossible to determine the value without ascertaining the amount of the actual or probable catch of fish at a given location for a given season."

The Court also erred in approving such finding.

XX.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. III, found and made by M. A. Langhorne, [645] Special Master herein, which finding of fact was and is in words and figures following, to wit:

"The defendants and cross-complainants up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911."

The Court also erred in approving such finding.

XXI.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. IV, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

> "During the entire time of the four fishing seasons mentioned in Finding of Fact Number Three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines therein for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows:
>
> In the year 1908, 150 tons
> In the year 1909, 104 tons
> In the year 1910, 135 tons
> In the year 1911, 390 tons
> Total for four years 779 tons."

The Court also erred in approving such finding.

XXII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. V, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

> "The set nets which the defendants would have operated upon said fishing locations, had they not been prevented by plaintiff from occupying the locations, would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of

779 tons, the amount shown by Finding of Fact Number Four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons."

The Court also erred in approving such finding. [646]

XXIII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VI, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons."

The Court also erred in approving such finding.

XXIV.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VII, found and made by M. A. Langhorne, Special Master herein, which find-

ing of fact was and is in words and figures following, to wit:

"As set forth in Finding of Fact No. 6, the amount of fish to which defendants were entitled as the rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of the fish for the four seasons was $130.00 per ton, and the 172 tons of fish were of the value of 22,360."

The Court also erred in approving such finding.

XXV.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VIII, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"The defendants and cross-complainants were equally interested in the said fishing locations."

The Court also erred in approving such finding.

XXVI.

The Court erred in not sustaining plaintiff's exception [647] to Conclusion of Law No. II, found and made by M. A. Langhorne, Special Master herein, which conclusion of law was and is in words and figures following, to wit:

"The value of 172 tons of fish was the aggregate rental value of defendants' fishing locations for the four fishing seasons, and that value is the measure of defendants' damages in the aggregate. The value as set forth in the finding of fact being $22,360, the defendants are entitled to recover that amount in the aggregate."

The Court also erred in approving such finding.

XXVII.

The Court erred in not sustaining plaintiff's exception to Conclusion of Law No. II, found and made by M. A. Langhorne, Special Master herein, which conclusion of law was and is in words and figures following, to wit:

> "The three defendants and cross-complainants, namely H. S. McGowan, Erick Lindstrom and J. P. Coyle are equally interested in the damages and should have a judgment accordingly."

The Court also erred in approving such finding.

XXVIII.

The Court erred in holding, adjudging and decreeing that there was evidence in the record which showed, or tended to show, that the established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season, when the lessor furnishes the fishing gear, but when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-half of the gross catch for his rent for the location and the gear, and the lessee is entitled to one-half of the gross catch.

XXIX.

The Court erred in holding, adjudging and decreeing that [648] there was evidence showing or tending to show, that there was any rule for fixing the

rental value of fishing locations upon the Columbia River, and in holding that it is impossible to determine the value of fishing locations for rental purposes without ascertaining the amount of the actual or probable catch of fish at a given location for a given season.

XXX.

The Court erred in holding, adjudging and decreeing that the defendants and cross-complainants up to the time of the interlocutory decree herein, had, by the restraining order issued in this case and by the act of plaintiff, been deprived of their, or either of their fishing locations and of the use of their set nets therein during the fishing season for the years 1908, 1909, 1910 and 1911, or at or during any time whatever.

XXXI.

The Court erred in holding, adjudging and decreeing that during the entire time, or any part or portion of the four fishing seasons for the years 1908, 1909, 1910 and 1911, the plaintiff occupied the defendants' fishing locations and operated drag seines therein for the purpose of catching salmon, and did catch large amounts of salmon fish each season, and during the year 1908, 150 tons; during the year 1909, 104 tons; during the year 1910, 135 tons; and during the year 1911, 390 tons, or a total of 779 tons and in decreeing the plaintiff caught any fish therein.

XXXII.

The Court erred in holding, adjudging and decreeing that the set nets which the defendants would have operated upon said fishing locations, had they not

been prevented by plaintiff from occupying the locations, would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of 779 [649] tons, making a total of 518 tons; and in adjudging and decreeing such set nets would have caught any fish whatever.

XXXIII.

The Court erred in holding, adjudging and decreeing that the defendants were in the position of forced lessors of the locations in question; and in adjudging and decreeing that defendants owned them and were entitled to them, and the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing the fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, namely, one-third of 518 tons being 172 tons; and in adjudging and decreeing that defendants were, or either was, entitled to anything.

XXXIV.

The Court erred in holding, adjudging and decreeing that the amount of fish to which the defendants were entitled as rental for said fishing grounds for the four seasons of 1908, 1909, 1910 and 1911 was in the aggregate 172 tons, and that the average price of fish for 1908 was $120.00 per ton; for the year 1909, $125.00 per ton; for the year 1910, $130.00 per ton; and for the year 1911, $130.00 per ton, aggregating

the sum of $22,083.00; and in adjudging and decreeing that defendants were, or either was, entitled to any sum whatever for rental, or otherwise.

XXXV.

The Court erred in holding, adjudging and decreeing that the defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle, were equally, or at all, interested in the fishing locations in controversy. [650]

XXXVI.

The Court erred in holding, adjudging and decreeing that the value of 172 tons of fish, or any sum whatever, was the aggregate rental value of defendants' H. S. McGowan, Erick Lindstrom, and J. P. Coyle, fishing locations for the four fishing seasons of 1908, 1909, 1910 and 1911; and in adjudging and decreeing that such value is the measure of such defendants' damages in this suit; and in adjudging and decreeing that the amount of such damages is $22,083.00; and in adjudging and decreeing that such defendants were, or either was, entitled to any sum whatever.

XXXVII.

The Court erred in holding, adjudging and decreeing that the three defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, are equally interested in the damages, and each is entitled to one-third of the said amount of $22,083.00; and in adjudging and decreeing that said defendants were, or either was, entitled to any sum or amount.

XXXVIII.

The Court erred in rendering and entering judg-

ment in favor of the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, against the plaintiff, in the sum of $22,038.00, or in any sum whatever.

XXXIX.

The Court erred in rendering and entering judgment in favor of the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, and against the United States Fidelity and Guaranty Company, in the sum of $12,000.00, or in any sum whatever.

XL.

The Court erred in rendering and entering judgment [651] against the plaintiff in favor of defendant, H. S. McGowan, in the sum of $7,361.00, together with the sum of $361.10, costs of suit; and in rendering and entering judgment against the United States Fidelity and Guaranty Company in favor of defendant H. S. McGowan in the sum of $4,000.00.

XLI.

The Court erred in rendering and entering judgment in favor of defendant Erick Lindstrom and against this plaintiff in the sum of $7,361.00, together with the sum of $361.10, costs of suit; and in rendering and entering judgment in favor of defendant Erick Lindstrom against the United States Fidelity and Guaranty Company in the sum of $4,000.00.

XLII.

The Court erred in rendering and entering judgment in favor of defendant J. P. Coyle against the plaintiff, in the sum of $7,361.00, together with the further sum of $361.10, costs of suit; and in render-

ing and entering judgment in favor of defendant J. P. Coyle, against the United States Fidelity and Guaranty Company, in the sum of $4,000.00.

XLIII.

The Court erred in not granting the plaintiff the relief demanded, and in dismissing plaintiff's suit.

XLIV.

There was no testimony or evidence whatever in the record in this case showing, or tending to show, that there was any established method, or any rule or custom, among fishermen for determining the value of a fishing ground or fishing location, or set net location, on the Columbia River, and there is no evidence in the record showing, or tending to show, or to the effect that the custom or method of determining the value of a fishing ground, [652] fishing location, or set net location, is one-third of the gross catch of fish thereon during the season when the lessee furnishes all gear, but when the lessor furnishes both grounds and gear, the lessor receives one-half of all fish caught thereon. Therefore, the Court erred in so holding, adjudging and decreeing.

XLV.

There is no evidence in the record sustaining the findings, judgment and decree rendered and entered by the above-entitled court, and the findings, judgment and decree rendered herein are not supported by the finding, but are against law and facts, and the Court erred in rendering and entering the same.

Wherefore, plaintiff prays that the judgments and decrees herein described and complained of be reversed, and that the said Court be directed to enter a

decree as prayed for by plaintiff in its amended bill of complaint.

G. C. FULTON,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [653]

[Bond on Appeal.]

KNOW ALL MEN BY THESE PRESENTS:

That we, Columbia River Packers' Association, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, duly authorized and licensed to execute surety bonds in the State of Washington and all surety bonds required in the United States District Court for the Western District of Washington, Southern Division, as surety, are held and firmly bound unto H. S. McGowan, Erick Lindstrom and J. P. Coyle, in the full and just sum of Twenty-five Thousand Dollars ($25,000.00), to be paid to said H. S. McGowan, Erick Lindstrom and J. P. Coyle, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this third day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

WHEREAS, lately at the District Court of the United States for the Western District of Washing-

ton, Southern Division, in a suit pending in said court between Columbia River Packers' Association, plaintiff, and H. S. McGowan, Erick Lindstrom and J. P. Coyle, defendants, a decree was rendered against the Columbia River Packers' Association, and the said Columbia River Packers' Association, having obtained an appeal and having appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal having been allowed to reverse the decree in the aforesaid suit, and a citation having been issued directed to the said H. S. McGowan, Erick Lindstrom and J. P. Coyle, citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within [654] thirty (30) days from the date of said citation.

Now, the condition of the above obligation is such, that if the said Columbia River Packers' Association shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

COLUMBIA RIVER PACKERS' ASSOCIATION, [Seal]

By W. O. BARNES,

Its Secretary.

[Seal of the Columbia River Packers' Association.]

UNITED STATES FIDELITY & GUARANTY COMPANY. [Seal]

By F. H. HILL,

Its Attorney in Fact.

[Seal of Surety Co.]

Signed and delivered in the presence of:

W. M. SMITH.

O. A. WIRKKOLA.

Approved this 3d day of December, A. D. 1913, and proceedings stayed.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [655]

Citation on Appeal [Copy].

To H. S. McGowan, Erick Lindstrom and J. P. Coyle, Greeting:

WHEREAS, the Columbia River Packers' Association, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the Western District of Washington, Southern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to do and receive what may appertain to justice to be done in the premises, and to show cause, if any there be, why the said judgment and decree rendered and entered in said District Court aforesaid, in said appeal mentioned, should not be reversed, modi-

fied or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Tacoma, in the United States District Court, Western District of Washington, Southern Division, this 3d day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

EDWARD E. CUSHMAN,
Judge of United States District Court, Western District of Washington, Southern Division.

Due service of the foregoing Citation on Appeal is hereby accepted and acknowledged together with a true copy thereof, this 3d day of December, 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants. [656]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [657]

In the United States District Court for the Western District of Washington, Southern Division.

No. 1385–C.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Complainant,

vs.

H. S. McGOWAN et al.,

Defendants.

Order [Directing Certification of All Exhibits, Except Plaintiff's Exhibit "E."]

It appearing to the Court that all of the exhibits introduced in evidence, on the trial of this cause, excepting Plaintiff's Exhibit "E," should be inspected by the Appellate Court, on the appeal in this cause.

IT IS THEREFORE ORDERED that all of the exhibits introduced in evidence, on the trial of this cause by each of the parties, excepting only Plaintiff's Exhibit "E," be certified up with the record by the Clerk of this court to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such exhibits need not be included in the printed abstract of record on appeal. Plaintiff's Exhibit "E" shall be printed in abstract of record on appeal.

Done in open court third day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [658]

[Order Extending Time to March 3, 1914, to File Record on Appeal (Copy).]

In the United States District Court for the Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Complainant and Appellant,

vs.

H. S. McGOWAN et al.,

Defendants and Appellees.

Upon application of both complainant and defendant herein by their respective attorneys, and good cause appearing therefor,

IT IS ORDERED that the time within which the plaintiff shall prepare and file transcript upon the appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, be and hereby is extended for an additional period of 60 days, to wit: until the 3d day of March, 1914.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[659]**

[Order Extending Time to April 15, 1914, to File Record on Appeal (Copy).]

In the United States Circuit Court of Appeals for the Ninth Circuit.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN et al.,

Appellees.

For good cause shown,

IT IS NOW ORDERED that the time within which the transcript on appeal in this cause may be filed in San Francisco, California, be and the same is hereby extended to and including April 15th, 1914.

Dated February 28th, 1914.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 28, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [660]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washing-

ton, do hereby certify and return that the foregoing pages numbered from 1 to 660 inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Columbia River Packers' Association vs. McGowan et al., lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court at the City of Tacoma, in the District aforesaid.

I further certify and attach hereto the original Citation, original order extending time to March 3d, 1914, and original order extending time to April 15th, 1914; and I do further certify that pursuant to the order made in this cause on December 3d, 1913 (a copy of which order is incorporated in this transcript of record), all exhibits introduced in evidence on the trial of this cause by each party, excepting only Plaintiff's Exhibit "E" are hereby certified and attached hereto.

I further certify that the cost of certifying the foregoing transcript amounted to the sum of $521.50, which amount has been paid to the Clerk by the solicitor for appellant.

ATTEST my official signature and the seal of this Court at Tacoma, in said District, this first day of April, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

Citation on Appeal [Original].

To H. S. McGowan, Erick Lindstrom and J. P. Coyle, Greeting:

WHEREAS, the Columbia River Packers' Association, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the Western District of Washington, Southern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to do and receive what may appertain to justice to be done in the premises, and to show cause, if any there be, why the said judgment and decree rendered and entered in said District Court aforesaid, in said appeal mentioned, should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Tacoma, in the United States District Court, Western District of Washington, Southern Division, this 3d day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] EDWARD E. CUSHMAN,
Judge of United States District Court, Western District of Washington, Southern Division.

Due service of the foregoing citation on appeal is

hereby accepted and acknowledged, together with a true copy thereof, this 3d day of December, 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: No. ——. United States District Court, Western District of Washington, Southern Division. Columbia River Packers' Association, Plaintiff, vs. H. S. McGowan et al., Defendants. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. G. C. Fulton, Attorney for Appellant.

[Order Extending Time to March 3, 1914, to File Record on Appeal (Original).]

In the United States District Court for the Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Complainant and Appellant,

vs.

H. S. McGOWAN et al.,

Defendants and Appellees.

Upon application of both complainant and defendant herein by their respective attorneys, and good cause appearing therefor,

IT IS ORDERED that the time within which the plaintiff shall prepare and file transcript upon the

appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, be and hereby is extended for an additional period of 60 days, to wit: until the 3d day of March, 1914.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 1385–C. In the District Court of the United States for the Western District of Washington, Tacoma. Columbia River Packers' Association, Complainant, vs. H. S. McGowan et al., Defendants. Order Extending Time for Transcript. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Order Extending Time to April 15, 1914, to File Record on Appeal (Original).]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,
Appellant,

vs.

H. S. McGOWAN et al.,
Appellees.

For good cause shown,

IT IS NOW ORDERED that the time within which the transcript on appeal in this cause may be

filed in San Francisco, California, be, and the same is hereby extended to and including April 15th, 1914.

Dated February 28, 1914.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Columbia River Packers' Association, a Corporation, Appellant, vs. H. S. McGowan et al., Appellees. Order Extending Time on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 28, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2396. United States Circuit Court of Appeals for the Ninth Circuit. Columbia River Packers' Association, a Corporation, Appellant, vs. H. S. McGowan, Erick Lindstrom, J. P. Coyle, Walter Bussey and I. N. Stensland, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received and filed April 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed July 1, 1914. F. D. Monckton, Clerk.

No. 2396

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Title of Court and Cause.]

Motion to Dismiss the Appeal.

Come now, H. S. McGowan, Erick Lindstrom and J. P. Coyle, appellees in the above-entitled cause, by Welsh & Welsh and Dorr & Hadley, their solicitors, and move the Court to dismiss the appeal herein upon the following grounds:

1. Failure to include, as a party to this appeal, the surety on the injunction bonds, to wit, The United States Fidelity and Guaranty Company, against which a joint judgment to the extent of its liability was entered, it being a necessary party to this appeal.

2. Absence of any showing in the record that a summons or notice was served or any attempt made to sever the interest of appellant from that of the surety, so that a separate appeal might be maintained.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

[Title of Court and Cause.]

Notice of Hearing on Motion to Dismiss the Appeal.

To the Columbia River Packers' Association, Appellant in the Above-entitled Cause, and to G. C. Fulton, Its Solicitor:

You are hereby notified that the foregoing motion to dismiss the appeal in the above-entitled cause will be called up for hearing before the Court at the time

said appeal is to be heard, to wit, at the United States courtroom in Seattle, Washington, September 14, 1914, or as soon hereafter as counsel can be heard.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees. * * *

[Endorsed]: Motion and Notice to Dismiss Appeal. * * * Filed Aug. 21, 1914. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Motion for Issuance of a New Citation.

Comes now the above-named appellant, by its solicitor, G. C. Fulton, and hereby moves the Court for an order directing the issuance of a new citation herein directed to the United States Fidelity and Guaranty Company, the surety on the injunction bond of appellant and against whom a judgment was entered in the court below, as such surety.

In support of this motion, appellant avers that as it and its solicitor was advised at the taking of the appeal herein, said, The United States Fidelity and Guaranty Company, was not a proper party to this appeal and it was not proper to serve it with citation. That this appeal was taken and is prosecuted in good faith, and with the sole intent to have this cause fairly submitted to this Court.

G. C. FULTON,
Solicitor for Appellant. * * *

[Endorsed]: Motion for Issuance of a New Citation. * * * Filed Sep. 10, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the September Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the city of Seattle, in the State of Washington, on Monday, the fourteenth day of September, in the year of our Lord one thousand nine hundred and fourteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

[Title of Cause.]

Order of Submission.

ORDERED, Appeal, Motion to Dismiss Appeal, and Motion for Issuance of a New Citation, argued by Mr. G. C. Fulton, counsel for the appellant, and in opposition to the Motion to Dismiss Appeal, and on behalf of the Motion for the Issuance of a New Citation, and by Messrs. Fred W Dorr, and Hiram E. Hadley, counsel for the appellees, and on behalf of the Motion to Dismiss Appeal, and in opposition to the Motion for the Issuance of a New Citation, and submitted to the Court for consideration and decision, with leave to Mr. Fulton to file a copy of the Appellant's Abstract of Record, Brief, Respondent's Brief, Reply-Brief of Appellant in the cause

entitled "Eagle Cliff Fishing Co. v. H. S. McGowan," in the Supreme Court of the State of Oregon.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the thirteenth day of October, in the year of our Lord one thousand nine hundred and fourteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

[Title of Cause.]

Order Denying Motion to Dismiss Appeal and Motion for Issuance of a New Citation.

In accordance with the opinion this day rendered and filed by this Court in the above-entitled cause, it is ORDERED that the Motion to Dismiss the Appeal, and the Motion for the Issuance of a New Citation, in the above-entitled cause be and hereby are denied.

[Title of Court and Cause.]

Opinion on Motion to Dismiss Appeal and on Motion for Issuance of a new Citation.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

G. C. FULTON, for the Appellant.

WELSH & WELSH and DORR & HADLEY, for the Appellees.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, delivered the opinion of the court:

On August 11th, 1908, the appellant filed in the court below its amended complaint wherein it asked for an injunction to enjoin and restrain the appellees, and Walter Bussey and I. N. Stensland, from placing in any of the waters of the Columbia River in front of or adjacent to three certain fishing sites, on Sand Island, alleged in the bill to belong to the appellant, or from maintaining in front of its premises in such waters, any obstruction whatever, and particularly the obstructions alleged in the bill to have been maintained there by the appellees, and from any interference with the free and uninterrupted ingress to and egress from such premises. A restraining order was granted by the court below, and the appellant was required to furnish a bond in the sum of $2,000, and subsequently an additional bond in the sum of $10,000. On each of these bonds the

United States Fidelity and Guaranty Company became surety, "to pay all damages and costs which may accrue to the defendants by reason of said injunction or restraining order not exceeding" the sum named in the bond. Answers and cross-complaints were filed by the appellees McGowan, Lindstrom and Coyle (the defendants Walter Bussey and I. N. Stensland having been dismissed from the suit without costs). After a hearing before the Court the restraining order theretofore issued against the appellees was dissolved, and it was ordered that the matter be referred to a Special Master for the taking of testimony upon the question of the damages suffered by the appellees by reason of the granting of the restraining order. In the report of the Master it was found "that the defendants were equally interested in the fishing locations, and that they should have separate judgments, each for one third of the total amount of recovery, and each for one-third of the total costs incurred,—each of such judgments to be limited to four thousand dollars as against the bondsmen, which taken together will make twelve thousand dollars, the face of the bond." On September 22, 1913, a final decree was entered by the court below wherein it was ordered, adjudged and decreed that separate judgments should be entered therein in favor of each of the defendants for one third of the total amount of recovery, to wit, one-third of $22,083, and for one-third of the total costs incurred by the defendants, and that said judgments should also be entered against the United States Fidelity and Guaranty Company, the surety upon

the injunction bonds given by the complainant in this cause, each judgment against the surety, however, to be limited to the sum of $4,000. Thereupon the Court entered a separate judgment in favor of each of the appellees, against the Columbia River Packers' Association, in the sum of $7,361, together with the sum of $316.10, costs taxed therein, and also a separate judgment that each of the appellees recover from the United States Fidelity and Guaranty Company, surety, the sum of $4,000, which amount it was recited was included in the sum awarded against the complainant in each judgment, it being especially declared that the liability of the surety and of the complainant was coequal to the extent of $4,000 and no more.

From this decree and judgment the appellant has appealed to this court.

A motion to dismiss the appeal has been interposed by the appellees on the ground of failure of the appellant to include, as a party to the appeal, the United States Fidelity and Guaranty Company, the surety on the injunction bonds. The contention is that the surety company is a necessary party to the appeal for the reasons,—1st: That the judgment entered in the court below was a joint judgment against the appellant and its surety to the extent of the liability of the latter; and, 2d: That the record discloses that no notice was served or any attempt made to sever the interest of the appellant from that of the surety, so that a separate appeal might be maintained by the latter,

The appellant meets the motion to dismiss the ap-

peal filed by the appellees with a motion for an order directing the issuance of a new citation to the surety company. The appellees resist the motion of the appellant to thus amend its citation, and in support of their contention to dismiss the appeal they invoke the rule laid down by the Supreme Court of the United States in the case of Estis v. Trabue, 128 U. S. 225. In that case the writ of error was dismissed by the Supreme Court of its own motion, and the rule was there laid down that there the judgment below is a money judgment against the claimants and their sureties in a bond, naming them jointly, and the sureties do not join in the writ of error, and there is no proper summons and severance, the defect is a substantial one which that court could not amend, and by reason of which it had no jurisdiction to try the case and it would of its own motion dismiss the case without awaiting the action of the parties. Referring to the judgment in that case the Court said:

> "There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties,"

It was because the judgment in that case was joint and not distributive and separate against the claimants and sureties that it was held that all the parties against whom the judgment had been entered had not joined in the writ of error, and the Court could not, therefore, try the case, and the writ of error was dismissed. That is not this case. In this case we have a separate, distributive judgment fixing the

amount adjudged against the complainant in favor of each of the defendants, and also fixing the amount adjudged against the surety company on the complainant's bond, and in favor of each of the defendants. These judgments are clearly the exception mentioned by the court where the sureties have the right to a separate writ of error or appeal, and their failure to take such appeal does not deprive the Appellate Court of jurisdiction of the case with respect to the other appellants.

The case of Mason v. United States, 136 U. S. 581, is also cited by the appellees in support of the motion to dismiss the appeal. In that case the action was against the postmaster at Chicago, and the sureties on his official bond, the alleged breach being that he had not accounted to the United States for large sums of money received by him from the sale of postage stamps and other sources connected with the postal service. The process was against the postmaster and seven of the sureties jointly. The judgment does not appear in the record, but it is to be presumed that it followed the process and was joint against all the defendants. A writ of error was taken to the Supreme Court by certain of the sureties who had appeared in the court below, without joining the principal or certain other of the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of those parties. The motion for leave to amend the writ of error was denied and the writ dismissed. The dismissal was in accordance with the rule de-

clared in Estis v. Trabue, *supra.*

The case of Inland and Seaboard Coasting Company v. Tolson, 136 U. S. 572, decided by the Supreme Court on January 6th, 1890, less than one year after the rendition of its decision in Estis v. Trabue, *supra,* and four months prior to the decision in Mason v. United States, *supra,* is not easily distinguished from those two cases. In this intermediate case a judgment had been rendered in favor of the plaintiff and against a sole defendant at a special term of the Supreme Court of the District of Columbia. The defendant appealed to the General Term and gave sureties. The General Term confirmed the judgment of the lower court and entered a judgment against the defendant and against the sureties. The defendant then sued out a writ of error from the Supreme Court of the United States, without joining the sureties. The defendant in error moved to dismiss the writ for nonjoinder of the sureties and the writ was accordingly dismissed by that court on November 4th, 1889. On December 23, 1889, counsel for the plaintiff in error moved to rescind the judgment of dismissal and to restore the cause to the docket. In support of the motion it was urged, among other things, that it was too late to sue out another writ of error. Counsel for the defendant in error resisted the motion, contending that the objection to the writ of error was jurisdictional and could not be cured by amendment, calling the attention of the Court to its order of November 4th, 1889, in the same case, and also to its decision in the case of Estis v. Trabue, *supra,* rendered less than one year prior

thereto. On January 6th, 1890, the motion to rescind the judgment of dismissal, to restore the cause to the docket, and to amend the writ of error by inserting the names of the sureties, was granted, and the case returned to the docket. The Court rendered no opinion in the case, but it seems probable that the Court deemed the judgment a joint judgment, and the amendment appears to have been allowed under the provisions of section 1005 of the Revised Statutes. The case is not an authority for enlarging the terms of the statute to bring in parties to a separate judgment in an equity case by the issuance of an amended citation after the time for appeal has expired.

The case of Copeland v. Waldron, 133 Fed. 219, in this court, cited by the appellees in support of the motion to dismiss, was an appeal from a joint decree. It was there held that where the record failed to show that one of the defendants was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect was not one of form only which the Circuit Court of Appeals might permit the appellants to cure by amendment under section 1005 of the Revised Statutes, but was fatal to jurisdiction on appeal. The distinction between that case and the present case is obvious. In that case the decree was joint against all the defendants. In this case the decree is separate and distinct with respect to all the parties to it, and distributive in its award of damages and costs against each. From such a decree each of the judgment debtors may prosecute an appeal, and a failure to join all in

an appeal is not fatal to the jurisdiction of this court.

The rule applicable in this case is stated in 2 Cyc. 760, as follows:

> "Where a decree or judgment is several both in form and in substance, and the interest represented by each of the coparties, plaintiff or defendant, is separate and distinct from that of the others, any party may appeal or sue out a writ of error separately, to protect his own interests, without joining his coparties in the appeal, and without a summons and severance."

The motion to dismiss the appeal is denied, and the motion for the issuance of a new citation is also denied.

[Endorsed]: Filed Oct. 13, 1914. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court as to Filing Date on Petition for Dismissal.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify that in the case of Columbia River Packers' Association, a Corporation, versus H. S. McGowan et al., No. 1385 of this court, and No. 2396 of the Circuit Court of Appeals, the original petition of the plaintiff to dismiss the case for want of jurisdiction was filed in the United States Circuit Court for the Western District of Washington, on

June 4th, 1909. The file-mark on said petition reading as follows:

"FILED
U. S. CIRCUIT COURT,
Western District of Washington,
JUN. 4, 1909.
A. REEVES AYRES, Clerk.
————, Deputy."

ATTEST my official signature and the seal of the said District Court at the city of Tacoma, this sixteenth day of October, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk.

[Endorsed]: Filed Oct. 19, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of November, in the year of our Lord one thousand nine hundred and fourteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF A CERTAIN DECREE AND JUDGMENTS.

ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Decree or Judgment be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * Columbia River Packers' Association, a Corporation, vs. H. S. McGowan et al., No. 2396, * * * .

[Title of Court and Cause.]

Opinion of U. S. Circuit Court of Appeals.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Suit in equity by the appellant (plaintiff in the court below), against the appellees (defendants in the court below), for an injunction, enjoining and restraining the appellees from placing obstructions in any of the waters of the Columbia River in front of or adjoining two certain fishing sites on Sand Island, known as Sites Nos. Two and Three, alleged to belong to the plaintiff, and from interfering with the free and uninterrupted ingress to and egress from such premises; that all obstructions placed in front of such premises be abated, and that the defendants be required to remove the same.

The plaintiff is an Oregon corporation. Each of the defendants is a citizen of the State of Washington.

In an amended complaint filed by the plaintiff on August 11th, 1908, it is alleged that the United States is the owner in fee of a tract of land situated in the county of Pacific in the State of Washington, being an island in the Columbia River near the mouth thereof generally known and described as Sand Island; together with all the tide-lands, water rights, privileges and easements surrounding and adjacent thereto and bordering thereon; that by proclamation of the President of the United States issued on the 29th day of August, 1863, Sand Island was reserved from sale for military purposes and the same has ever since been held and reserved by the United States; that on May 1st, 1908, the Secretary of War of the United States leased to the plaintiff for a good and valuable consideration, the portions of Sand Island designated on the maps of the Government survey as Sites Nos. 2 and 3, for the term of three years, together with the tide-lands, water rights, fishing rights and riparian rights adjacent thereto; the portion of the island so leased being all the frontage, tide-lands, riparian rights, water rights and privileges south, and the high-lands north, of the low-water mark of the Columbia River on the south side of the river; that upon the execution and delivery of the lease from the United States, the plaintiff immediately entered into the possession of the fishing sites; that Sand Island including Sites Nos. 2 and 3, consists of a sandy beach from the line of low water

to the line of high water; that above the high water it is composed entirely of sand; that practically no vegetation grows thereon and it is not susceptible to cultivation or agricultural uses; that the bed of the Columbia River below the low-water line is quite level, with a hard, sandy bottom, with a gradual slope for a short distance into deep water; that the main channel of the Columbia River washes the shore of the island where the waters are navigated by all the ocean-going vessels, and all the vessels that carry the commerce of Washington and Oregon navigate such waters; that the fishing sites leased to the plaintiff are of great value for the right of fishery thereon, and the right to operate seines from the shore into the waters thereof, and to haul and land seines in front thereof for the purpose of catching salmon during the salmon fishing season of each year on the Columbia River; the fishing sites having been leased by the United States to the plaintiff for the sole purpose of use as a fishery; that on the 30th day of June, 1908, the plaintiff applied to the Fish Commissioner of the State of Washington, pursuant to the laws of that State, for licenses to operate three seines upon Sites Nos. 2 and 3 on Sand Island: that thereupon the Fish Commissioner issued to the plaintiff three licenses whereby the plaintiff became entitled to operate three seines in the waters of the Columbia River within the State of Washington for the period of one year thereafter; that on July 2, 1908, while the lease from the United States to the plaintiff was in full force and effect, as well as the licenses issued by the Fish Commissioner of the State

of Washington to the plaintiff, the plaintiff entered upon the leased premises, together with its three seines and seining outfit, for the purpose of catching salmon; that in order to operate seines in front of Sites 2 and 3 it is necessary that the waters and channel of the river be free and unobstructed for the reason that it is necessary to lay each seine out into the waters of the river for a distance of two or three hundred fathoms, (the length of each seine) and to permit the seine to drift with the tide and current and then to haul the seine in onto the shore; that the plaintiff was proceeding to operate its seines under its licenses when the defendants, without the consent of the plaintiff, placed in the channel of the navigable waters of the Columbia River directly in front of Sites 2 and 3 certain obstructions to the navigation of the waters of the river consisting of large stones to which were attached wire cables and chains, and large timbers for a float or buoy; that the obstructions were seven in number and were placed in the waters of the river about fifty to one hundred feet from the shore and about two or three hundred feet apart; that the stones and anchors and weights were large and of great weight, and were so placed that the plaintiff could not operate its seines in the waters of the river, and could not land its seines on the shores of the island; that the obstructions excluded the public generally from operating either gill-nets, drift-nets or seines in the waters of the Columbia River, and prevented the free ingress and egress to and from said premises from and to the navigable waters of the river.

It is further alleged in the amended complaint that the plaintiff removed all of the obstructions and was proceeding to operate its seines in the waters in front of its premises and on the shores thereof, when the defendants, on the 4th day of July, 1908, against the plaintiff's consent, placed six other obstructions in front of the premises in practically the same position as those which had been removed by the plaintiff; the last-mentioned obstructions being of the identical nature of those which had been removed by the plaintiff; that these latter obstructions were placed in such position as to absolutely prevent the plaintiff from operating its seines and landing the same on the shore of Sand Island; that the obstructions were in the navigable waters of the Columbia River and were so placed as to prevent free ingress to and egress from the premises of the plaintiff; that the plaintiff had expended for the purchase of seines and appliances necessary to conduct seining operations on its fishing sites about $15,000, and had employed a large number of men, and engaged a large number of horses, necessitating an expenditure of $200 per day; that in addition, the plaintiff was required to pay as rental for the fishing sites the sum of $5,175 per annum; that the salmon in the Columbia River are of great value and ascend the river only at certain intervals during each year; that at the time of the filing of the bill they were in the waters of the Columbia River in great numbers.

It is further alleged that the obstructions were placed in the waters of the Columbia River without any authority from the officers of the Government of

the United States, and in violation of the laws of the United States and of the State of Washington; that the obstructions were not for the purpose of trade or commerce, or for any particular use, but were placed in the waters of the river for the purpose of harrassing and annoying the plaintiff and preventing it from operating its seines; that they were not placed in the river in good faith, and each was an obstruction to the navigation of the river.

It was alleged that the trespass of the defendants was continuous, and that the defendants would, unless restrained by the Court, continue daily to place obstructions to the operation of plaintiff's seines in the waters of the river in front of the plaintiff's premises, and prevent plaintiff from having ingress to and egress from its premises. It was further alleged that if the defendants were permitted to maintain the obstructions, plaintiff would not be able to use its fishing grounds or employ its seines, and would by reason thereof be irreparably damaged.

The plaintiff prayed for a preliminary injunction enjoining and restraining the defendants and each of them, and their agents and employees, from placing in any of the waters of the Columbia River in front of or adjacent to Sites Nos. 2 and 3 on Sand Island, or from maintaining in front of those premises in the waters of the river, any obstruction whatever, and particularly the obstructions maintained at the time of the filing of the bill, and from any interference with the free and uninterrupted ingress to and egress from such premises; that all obstructions placed in such waters in front of the premises of the

plaintiff be abated and the defendants be required to remove the same; that upon their failure to remove the same the plaintiff be entitled to do so at the cost of the defendants.

On July 7th, 1908, a temporary injunction and restraining order was issued by the court below, pursuant to the prayer of the bill, enjoining and restraining the defendants, and each of them, and their servants and employees from in any manner interfering with the free ingress to and egress from the fishing sites of the plaintiff on Sand Island, and from placing or maintaining any obstruction, anchor, killock, timber, log or appliance whatever that would interfere with the use of a seine floating upon the navigable waters of the Columbia River in front of or adjacent to Sites Nos. 2 and 3 on Sand Island in the county of Pacific, in the State of Washington.

Answers and cross-bills were filed by the defendants on August 28th, 1908. The answers put in issue the material allegations of the bill. It was admitted, however, that Sand Island, together with the fishing sites appurtenant thereto, were in Pacific County, State of Washington, and within the jurisdiction of the court below. It appeared from the answers that on the 2d day of July, 1908, the defendants were engaged in the operation of set nets in the waters of the Columbia River on the south side of Sand Island, the set nets being operated for the purpose of catching salmon under licenses issued by the Fish Commissioner of the State of Washington; that each of the set nets was

situated in front of Sand Island beyond the line of ordinary low water, and between the point of extreme low tide and the adjacent channel of the Columbia River; that each set net was located by a stone anchor weighing about three hundred pounds, to which was attached a cable about five feet long which was clamped to a wire rope about twenty-five feet long, to which was attached a cedar buoy about four feet long and eight inches square. The defendants denied that the set nets constituted any obstruction to the navigable waters of the river, and denied that they were so placed as to prevent free ingress to and egress from Sand Island or any part thereof. The defendants also denied that the fishing nets were placed or used in the waters of the Columbia River for the purpose of annoying the plaintiff or that the same were placed there for the purpose of preventing the plaintiff from operating its seines.

In the cross-bills the defendants alleged that neither of the set nets was located upon any part of either Site No. 2 or Site No. 3; that by reason of the fact that they had been enjoined by the Court and prevented from fishing for salmon they had been damaged to the extent of many thousands of dollars, the exact amount of which it was impossible to state; that the plaintiff had threatened to, and would, unless restrained by the Court, prevent the defendants from fishing for salmon, or operating their nets for that purpose, and would exercise an exclusive right of fishing at the place where the defendants' set nets were situated at the time of the filing of the bill.

The defendants accordingly asked for an injunc-

tion, enjoining and restraining the plaintiff from fishing on the locations of the defendants' set nets in the Columbia River, and from interfering with the defendants in the maintenance and operation of the same. The defendants also asked for a judgment for the damages sustained by them by reason of the issuance of the temporary restraining order.

The plaintiff demurrer to the cross-complaints. The demurrer was overruled. The plaintiff then answered the cross-complaints denying the material allegations thereof, and alleging that the acts of the defendants in placing set nets in front of its fishing sites on Sand Island were the continuing trespasses complained of in the bill. The plaintiff further alleged that it had an exclusive right to drag seines over and across the premises then occupied by the obstructions placed by the defendants in front of Sites Nos. 2 and 3, which the defendants called set nets; that the obstructions which the defendants called set nets were obstructions to the navigation of the waters of the Columbia River and absolutely prevented seining operations on Sites Nos. 2 and 3.

On June 4th, 1909, the plaintiff filed in the court below a petition, from the allegations of which it appeared that at the time of the institution of this suit, and long prior thereto, the officials of the State of Washington had contended that Sand Island was wholly within the territorial limits and jurisdiction of the State of Washington, and had denied that the State of Oregon, or its officers, had or could exercise jurisdiction thereover; that the officials of the State of Washington had contended that the south

boundary line of the State of Washington was the middle of the channel of the Columbia River located immediately south of Sand Island; that the claims of exclusive jurisdiction over Sand Island had been asserted and acted upon and sustained by the officers and courts of the State of Washington for many years prior to the institution of this suit; that pursuant to such claims the citizens of the State of Washington and the officials thereof had at all times taken possession of and exercised exclusive dominion over all of the fisheries and fishing rights pertaining to Sand Island, and over all of the waters north of the south channel of the Columbia River; that by reason of such acts and claims the plaintiff had been led to believe that Sand Island was within the territorial boundaries and jurisdiction of the State of Washington, and by reason thereof had instituted this suit in the court below expecting and intending to prosecute it to final determination; that since the institution of this suit the Supreme Court of the United States, by a decision rendered in the 16th day of November, 1908, in a cause wherein the State of Washington was claimant and the State of Oregon defendant, had held and judicially determined that the boundary line between the State of Washington and the State of Oregon then was, and at all times had been, the north ship channel of the Columbia River, located north of Sand Island; and that Sand Island then was, and at all times had been, within the territorial limits and jurisdiction of the State of Oregon. The plaintiff therefore prayed that the suit be dismissed, without prejudice, for the reason that

the court below had no jurisdiction over the subject matter thereof.

The petition to dismiss was denied. Thereupon the plaintiff obtained leave for and filed a supplemental bill in the court below setting forth the filing of the original bill, the filing of the answers thereto by the defendants wherein it was admitted that Sand Island and the premises in controversy were situated in Pacific County, Washington; and further setting forth the various proceedings in this suit as hereinabove set forth. The plaintiff prayed that if the Court should be of opinion that it had jurisdiction of the premises and of this suit, that the plaintiff have the judgment and decree prayed for in the original bill; but should the Court be of opinion that it had no jurisdiction of the suit, that it be dismissed without prejudice.

The defendants answered the supplemental bill denying that Sand Island and the fishing sites in controversy were not wholly within the State of Washington, and denying that the same at that time were within the State of Oregon. The defendants admitted that a suit had been brought in the United States Supreme Court by the State of Washington against the State of Oregon for the purpose of determing the boundary line between those states, and that a decision in that suit had been rendered as set forth in the supplemental bill; but they denied that by that decision it had been established that the boundary line between the States was to the north of Sand Island.

The various issues raised by the pleadings, includ-

ing the issue of jurisdiction, were heard by the court below. Thereafter an interlocutory decree was entered adjudging that the plaintiff take nothing by the suit and that the temporary injunction and restraining order theretofore issued against the defendants be dissolved and vacated; that the plaintiff be enjoined and restrained from interfering with the quiet and peaceable enjoyment by the defendants of the right to construct, maintain and operate the set nets and appliances maintained by them in the waters of the Columbia River below the ordinary low tide thereof. The matter was referred to a Special Master to ascertain and assess the damages suffered by the defendants by reason of the granting of the restraining order. Upon the report rendered by the master a final decree was entered in favor of the defendants for the sum of $22,083. From the final decree the plaintiff has prosecuted an appeal to this court.

G. C. FULTON, for the Appellant.

DORR & HADLEY and WELSH & WELSH, for the Appellees.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the Court:

There are three questions relating to the jurisdiction of the lower court involved in this case:

First. Is Sand Island with its south shore or tidelands on that shore within the territorial limits and jurisdiction of the State of Washington?

If this question is answered in the negative, the next question is,—

Second. Is the land under the waters of the Columbia River passing to the south of Sand Island within the concurrent jurisdiction of the courts of the State of Washington with respect to this controversy?

If this question is answered in the negative, the final question is,—

Third. Had the lower court equitable jurisdiction by reason of having acquired jurisdiction of the person of the defendants?

If any one of these questions is answered in the affirmative, the jurisdiction of the lower court must be sustained. If they are all answered in the negative the jurisdiction of the Court fails.

1. The boundary between the States of Oregon and Washington was established by Congress in the act providing for the admission of Oregon into the Union, approved February 14, 1859, (11 Stat. 383), and by the act providing for the admission of Washington, approved February 22, 1889 (25 Stat. 676). By order of the President of the United States, dated August 29th, 1863, Sand Island at the entrance of the Columbia River was reserved from sale, and has ever since been retained by the United States as a military reservation. By the act of the legislature of Oregon passed October 21, 1864, that State granted to the United States all the right and interest of the State of Oregon in and to the land in front of Fort Stevens and Point Adams situate in the State of Oregon, and subject to overflow between

high and low tide; and also to Sand Island situate at the mouth of the Columbia River in that State. These statutes were the subject of construction by the Supreme Court of the United States with respect to the boundary line between Oregon and Washington in the case of Washington v. Oregon, 211 U. S. 127. It was there held that the line followed the middle of the north channel passing to the north of Sand Island placing that island within the territorial jurisdiction of the State of Oregon.

The defendants in their answer to the supplemental bill admitted that a suit had been brought in the United States Supreme Court by the State of Washington against the State of Oregon for the purpose of determining the boundary line between those States, and that a decision in that suit had been rendered as set forth in the supplemental bill; but they denied that by that decision it had been established that the boundary line between the States was to be north of Sand Island. That contention is renewed in the brief filed by the defendants on this appeal. In support of it, it is urged that the Supreme Court fixed the boundary as "the center of the north channel, changed only as it may be from time to time through processes of accretion." The defendants assert that the boundary thus fixed was an indefinite roving line, controlled by the fluctuations of the shifting sands of the river; that the testimony in this case showed that the so-called north channel no longer existed to the northward of Sand Island, but had entirely shifted its waters and course to the southward of Sand Island,

the territory to the northward of Sand Island having shoaled up to accretion to such an extent that at ordinary low tide a man could walk from Sand Island to the Washington shore. In the decision on the petition for rehearing rendered in the boundary suit on March 8th, 1909 (Washington v. Oregon, 214 U. S. 215), the Supreme Court considered this very question. It was there said:

"Whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminished, yet, as all resulted from processes of accretion, or, perhaps, also of late years, from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

This is a complete answer to the claim of the defendants that the boundary as fixed by the Supreme Court in its first decision in the boundary suit is not the present boundary between the two States. It follows that since the admission of Oregon into the Union in 1859, Sand Island has been part of the territory of that State.

2. The next question to be determined is, whether the courts of the State of Washington have been vested with concurrent jurisdiction over this controversy?

By Section 1 of the act of Congress of March 2, 1853 (Chapter 90, 10 Stat. 172), all that part of the Territory of Oregon lying north of the "main channel of the Columbia River" was organized into the Territory of Washington, and by Section 21 of the

same act it is provided that "the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms a common boundary between said territories." Section 1 of the act of Congress admitting Oregon into the Union (Act of February 14, 1859, Chapter 33, 11 Stat. 383), after describing in detail the boundaries of the State, provided, "including jurisdiction in civil and criminal cases upon the Columbia and Snake Rivers, concurrently with states and territories of which those rivers form a boundary in common with said State." In Section 2 it is said: "The State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States nor or hereafter to be formed or bounded by the same." The act of Congress admitting Washington into the Union, and the Constitution of that State, are silent on the subject of concurrent jurisdiction. There is, therefore a question whether the State of Washington has, by appropriate concurrent action, acquired concurrent jurisdiction of the waters of the Columbia River; but we pass that question to consider whether in any view the courts of Washington have jurisdiction over the locality in controversy.

In Nielsen v. Oregon, 212 U. S. 315, one Chris Nielsen was a resident and inhabitant of the State of Washington, and a citizen of the United States. He had a license from the Fish Commissioner of

Washington to operate a purse-net on the Columbia River and was found on the waters of the Washington side of that river fishing with a purse-net. He was arrested for violating a law of the State of Oregon prohibiting the taking of fish in that manner. By the law of the State of Washington in force at that time fishing with a purse-net was lawful by those having a license so to do from the Fish Commissioner of that State. Nielsen was tried and convicted in the Courts of Oregon for violation of the law of that State. The single question was, whether the law of Oregon prohibiting the taking of fish with a purse-net extended over the entire waters of the Columbia River, or whether it was confined to the Oregon side. The Supreme Court of the State held that where adjoining States had concurrent jurisdiction on the waters forming their boundary, the laws of each State regulating the common right to take fish from such waters were valid and binding when not in conflict; and if there was a conflict the law of that State which was the most restrictive in its character must prevail; and to that extent the State which first assumed jurisdiction maintained it to the exclusion of the other. The Court accordingly held that the law of Oregon extended over the waters of the Columbia River and the conviction of Nielsen in the Oregon court was sustained. (State v. Nielsen, 95 Pac. 720.) The case was taken to the Supreme Court of the United States, where the judgment of the Supreme Court of the State of Oregon was reversed, the Supreme Court of the United States holding that for an act done in the territorial

limits of the State of Washington, under authority of a license from that State, a person could not be prosecuted and punished in the State of Oregon. (Nielsen v. Oregon, 212 U. S. 315, 321.)

In the present case the action is in the nature of a bill to restrain a trespass and abate a nuisance. When the action was commenced in 1908 in the United States Court in Washington, it was believed by the appellant that the locality of the alleged trespass and nuisance on the south side of Sand Island was within the territorial limits of the State of Washington, and the action was accordingly brought in that jurisdiction. In the appellees' answer to the appellant's bill of complaint it was admitted that Sand Island in the Columbia River was in the State of Washington. Upon the final decision of the Supreme Court of the United States on May 24th, 1909, holding that Sand Island was within the territorial jurisdiction of the State of Oregon, the appellant moved to dismiss its bill for want of jurisdiction on the ground that the suit was a local one and concerned real estate and property situate in the State of Oregon. The Court denied the motion to dismiss the bill, and referring to the decision of the Supreme Court of the United States in the case of Nielsen v. Oregon, *supra*, held that although the Constitution of the State of Washington defining the State's boundaries made no mention of concurrent jurisdiction, on the Columbia River, the State had not lost its jurisdiction by reason of its failure to assert it by positive enactment. The Court, however, placed its decision upon the act of Congress,

approved March 2, 1905, dividing the State of Washington into two judicial districts. The act provided that certain counties lying east of the Cascade Mountains with the waters thereof should be detached from the judicial district of Washington, "and the residue of said State, with the waters thereof, shall hereafter be the Western District of Washington." (33 Stat. 824.)

We are of opinion that assuming that the State of Washington has concurrent jurisdiction on the Columbia River, with respect to matters occurring on the river, it does not follow that the State has jurisdiction over a locality under the river within the territorial jurisdiction of the State of Oregon, and we do not understand that Nielsen v. Oregon so holds. The Court in that case was dealing with the question of jurisdiction on the waters of the Columbia River and with respect to a purse-net or seine operated upon the surface of the water; and in that case the Supreme Court held that Oregon did not have concurrent jurisdiction to impose its laws upon the Washington side of the river. In the present case we are dealing with a complaint relating to the operation of set-nets placed upon the ground under water in a fixed locality definitely known to be within the territorial limits of the State of Oregon. To hold that Sand Island and its shore, within the exclusive territorial jurisdiction of the State of Oregon, are also within the concurrent jurisdiction of the State of Washington, because the waters of the Columbia River separate and pass on both sides of the island, would be to extend concurrent juris-

diction to land for which we find no authority in any of the adjudged cases. We are of opinion that the courts of Washington acquired no concurrent jurisdiction over the locality in question under any construction of the statutes relating to concurrent jurisdiction on the Columbia River.

3. The final question is: Did the Court have equitable jurisdiction of the case by reason of having acquired jurisdiction of the person of the defendants?

To determine this question it is necessary to clearly understand the subject matter of the controversy. Sand Island, with its shore between high and low-water mark, is the property of the United States; the island by reservation of the President of the United States, August 29th, 1863, and the shore by grant of the State of Oregon, October 21st, 1864, to the United States, of all the tide-lands to Sand Island. Both land and shore of this island are within the territorial jurisdiction of the State of Oregon. By act of Congress approved July 28th, 1892 (27 Stat. 321), the Secretary of War was authorized in his discretion to lease for a period of not exceeding five years, such property of the United States under his control as might not at the time be required for public use. Uuder this authority, the Secretary of War had the United States engineers make a survey of the island, including the shore, and divide the southwest and south side of the island into fishing sites to be leased for seining operations. The southwest and south side of the island was accordingly divided into five seining sites,

and offered for lease to the highest bidder. Sites two and three, with which alone we are concerned in this case, had a frontage on the south channel of the Columbia River of 3,500 feet each. The first contract of lease was for three years, from 1905 to 1908, when the appellee, McGowan, was interested as a sublessee in the operation of the frontage included in Site No. 2, and he carried on fishing operations from the shore of that site without molestation or hinderance. For the term of three years from 1908 to 1911 the appellant and the appellees were rival bidders for Sites Two and Three. The appellant being the highest bidder was awarded the lease for this period at a rental of $5,175 per annum, payable in advance on the first day of May of each year. The appellees did not, however, abandon the locality, but procured from the Fish Commissioner of the State of Washington set-net licenses, and with this authority they proceeded to occupy the waters and ground below high water in front of the appellant's sites with set-nets, practically destroying the value of these shore sites to the appellant for fishing purposes. But manifestly the Fish Commissioner of the State of Washington had no authority to issue set-net licenses to be used at a fixed and definite locality within the territorial jurisdiction of the State of Oregon. It is true the appellant had also procured from the Fish Commissioner of the State of Washington licenses to fish with drag-nets in the waters of the Columbia River. Now, while it may be conceded that these licenses gave to the appellant no greater right to a locality than did the set-net

licenses of the appellees, the fact remains that the appellant had the right in common with the public to engage in the business of drawing seines in the waters of the Columbia River in front of Sites Two and Three, and the exclusive right of drawing and landing the same upon the shore of the island within those sites; and it is this exclusive right of drawing and landing on shore that we are considering, and not the general right of fishing in the Columbia River for which the appellant claims no exclusive right. It was when the appellant was proceeding to operate drag-nets from the shore within its sites that it met the obstacle and obstruction of set-nets placed in front of its sites by the appellees. It was then impossible for the appellant to operate its drag-nets from the shore, or draw or land the same on the shore, with the appellees' set-nets in front cutting off access to the river. Thereupon the appellant believing Sand Island to be within the territorial jurisdiction of the State of Washington, brought this suit against the appellees in the United States Circuit Court for that jurisdiction to restrain the trespass that was being committed by the appellees upon the appellant's right of access to and egress from its premises, and to abate the nuisances that were being erected in front of its premises. When the Supreme Court of the United States in its final decision of May 24th, 1909, in Washington v. Oregon, 214 U. S. 205, held that Sand Island was within the jurisdiction of Oregon, the appellant moved the Court to dismiss the action on the ground that it was a local action and the Court was without jurisdiction to

hear the case. The motion was resisted by the appellees and was denied by the Court on the ground that the Court had jurisdiction of the locality involved in this case, under the statutes giving it jurisdiction over the waters in the Northern District of Washington.

In Gilbert v. Moline Water Power and Manufacturing Company, 19 Iowa, 320, this precise question was before the Supreme Court of the State of Iowa. That was a suit brought in the courts of Iowa to abate a dam alleged to be a nuisance, on the Illinois side of the Mississippi River. It appeared that the plaintiff was a citizen of the State of Iowa. It also appeared that the property alleged to have been injured by the maintenance of the nuisance was within the jurisdiction of the Iowa Court. The plaintiff based his claim to jurisdiction upon the language of the acts admitting Illinois and Iowa into the Union, and the provisions of the Constitution and statutes of each State defining their respective boundaries. The act admitting Illinois gave to that State concurrent jurisdiction on the Mississippi River with any State or States to be formed west thereof, so far as the same should form a common boundary. The act admitting Iowa contained the same provision as to concurrence of jurisdiction. By the Constitution of Iowa the eastern boundary of the State was the middle of the main channel of the Mississippi River. In ruling against jurisdiction the Supreme Court of Iowa said:

"Now, while it is, of course, not claimed that the laws of this State would have any inherent author-

ity beyond the jurisdiction of the State, or that our laws can bind or affect property out of or beyond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either State may direct the manner of its use, and order its abatement or removal if found to be of the character charged. That the courts of Illinois might do this, there is, of course, no doubt. But the claim is, that our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us.

"There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made, and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property, by persons while *on the river,* for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases were made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel; whether the injury was inflicted or crime committed east or west or north or south of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this

respect would prove fatal to the action or proceeding. And hence the reason for making the jurisdiction concurrent in all such cases. Such property and persons are, as a rule, transitory, moving,—here to-day and gone to-morrow. Here is a common highway open to the citizens of all States and all nations. It is declared common territory, and, as to matters arising thereon, or persons found thereon, the sovereignties on either side have common or concurrent jurisdiction. Not so, however, as to an obstruction where the property therein, and the use thereof, is wholly on one side of the channel. It is as though an unhealthy, dangerous or illegal manufactory should be erected and continued on the Illinois shore, to the injury and annoyance of citizens on the Iowa side; and though such erection should extend below low-water mark, there would be no jurisdiction to declare its abatement in our courts. Such injuries are not *on* the river within the purview of the acts referred to and relied upon by counsel. And this conclusion is the more warrantable, when we consider that in this case the main dam extends from the shore to the island (Rock Island); that this island, containing hundreds of acres of land, is indisputably a part of the territory of our sister State, and that to reach this obstruction or nuisance, our courts and the officers thereof must go beyond this island, and decree and procure the removal of a work attached to the main shore, and placed there, too, we are bound to suppose with the consent of the State to which the corporation owes its life."

The leading case in support of the rule that juris-

diction on the navigable rivers does not extend from one State into another for the abatement or removal of nuisances is Mississippi and Missouri Railroad Company v. Ware, 67 U. S. 485. That was a suit brought in the District Court for the District of Iowa, for the abatement of the Rock Island Bridge over the Mississippi River from Rock Island, in the State of Illinois, to Davenport, in the State of Iowa. It was alleged that the bridge was a public nuisance. After laying down the rule that a public nuisance may be abated on a bill in equity brought by a private party who has suffered special damage, the Supreme Court of the United States said:

"The bridge is one thousand five hundred and seventy feet long, and the number of piers is six. Three of them are on the Iowa side of the river. The draw pier is the fourth; it is three hundred and eighty-six feet long at its bottom, and forty-five feet wide. The draw space on the Iowa side is one hundred and eleven feet, and on the Illinois side one hundred and sixteen feet wide in the clear. The distance from centre to centre of the small piers is two hundred and fifty-seven feet. The long pier stands at an angle with the thread of the current of about twenty-four degrees, and the small piers are nearly on a line with the thread of the current. The Illinois draw passage is directly over the deepest channel of the river and directly over the usual track of steamboats before the bridge was built. The Mississippi is about one thousand four hundred and ten feet wide at the bridge, and the middle of the

river is about eighty feet westwardly of the long pier.

"The Illinois draw passage (one hundred and sixteen feet), the width of the long pier (forty-five feet), and the eighty feet between it and the eastern line of Iowa cover a space of two hundred and forty feet of water way, and which embraces the main channel, where steamboats have at all times navigated. It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he founded his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance.

"An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to complainant's boats giving him the privilege to sue and abate the obstruction was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object because he has sustained special damage from that object.

"The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the Court's jurisdiction and powers of inquiry, and outside of the case."

If the Supreme Court of the United States could not sustain the jurisdiction of the Iowa Court on the waters of the Mississippi River to the abatement of

a nuisance thereon, in the State of Illinois, in a case in which a part of the nuisance at least was admitted to extend into the jurisdiction of the Court, much less in this case can the jurisdiction of the State of Washington on the waters of the Columbia be extended into the State of Oregon and sustained to abate a nuisance which is entirely within the jurisdictional limits of the State of Oregon.

The appellees in further support of the claim of jurisdiction invoke the equitable maxim that equity acts *in personam* and not *in rem.* They contend that the jurisdiction of the Court below was dependent neither upon the location of Sand Island nor upon the concurrent jurisdiction of the State of Washington and the State of Oregon on the waters of the Columbia River They assert that having secured jurisdiction of the parties to the controversy, the court below, as a court of equity, had full jurisdiction to try and dispose of all of the issues involved; that the injunction issued against the plaintiff operated *in personam,* and the plaintiff being within the jurisdiction of the Court, it was bound to obey the injunction although it required the doing of an act beyond the jurisdiction of the Court.

Neither the maxim, nor the argument which the defendants adduce from it, is applicable to this case.

Pomeroy, in his work on Equity Jurisprudence (3d Ed., sec. 1318), speaking of action *in personam,* says:

"The power to act *in personam,* through their remedies, is still held by all courts of equity. * * * Of this nature must always be the remedies when the

subject matter, either real or personal property, is situated beyond the territorial jurisdiction of the Court, in another State or country. The jurisdiction to grant such remedies is well settled. Where the subject matter is situated within another State or country, but the parties are within the jurisdiction of the Court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for the final accounting and settlement of a partnership, and the like, may be brought in any State where the jurisdiction of the defendant's person is obtained, although the land or other subject matter is situated in another state, or even in a foreign country. On the other hand, where the suit is strictly local, the subject matter is specific property, and the relief when granted is such that it *must* act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject matter is situated; * * * for example, a suit to abate a nuisance." (City Mississippi & Missouri Ry. Co. v. Ward, *supra.*)

In the Salton Sea Cases, 172 Fed. 792, 812, the objection was made that the Circuit Court of the United States for the Southern District of California

had no jurisdiction to decree an injunction in effect abating a nuisance injuring property within the jurisdiction of the Court. It was claimed that there was a rule supporting the objection that a court of equity could never compel a defendant to do anything which was not capable of being physically done within the territorial jurisdiction of the Court. This Court upheld the jurisdiction of the lower court, but placed the jurisdiction expressly upon the ground that the injured property was within the jurisdiction of the Court. (Citing Northern Indiana Ry. Co. v. Michigan Central Ry. Co., 56 U. S. 232; Mississippi & Missouri Ry. Co. v. Ward, *supra*; Gilbert v. Moline Water Power etc. Co., *supra.*)

There is nothing in the facts of this case to render these well settled rules of equity inapplicable, or, when applied, to render their application inequitable. The plaintiff accepting the general belief that Sand Island was within the territorial jurisdiction of the State of Washington, filed his suit in good faith in that district. Answers and cross-complaints were filed by the defendants, and answers to the cross-complaints were filed by the plaintiff after demurrer overruled. That was as far as the suit had progressed when the Supreme Court decided that Sand Island was within the jurisdiction of the State of Oregon. No hearing had been had and no testimony taken on the merits of the controversy. After the rendition of the decision of the Supreme Court of the United States in the boundary suit, the plaintiff, in equal good faith, petitioned the court below to dismiss the bill for lack of jurisdiction. At that

time the restraining order issued against the defendants upon the filing of the bill had been in effect eleven months. The defendants having resisted the motion to dismiss, and having insisted that the suit be heard and determined by the Court below, cannot now be heard to complain that the plaintiff insists that the Court is without equitable jurisdiction to hear and determine the controversy.

The decree of the court below is reversed with directions to dismiss the bill. The costs will be divided; the costs prior to the appellant's motion to dismiss the bill to be paid by the appellant, the remaining costs to be paid by the appellees.

[Endorsed]: Filed Nov. 16, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2396.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Appellees.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in this court in favor of the appellant and against the appellees, and with directions to the said District Court to dismiss the bill, the costs in the said District Court to be divided as follows: the costs prior to the appellant's motion to dismiss the bill to be paid by the appellant, the remaining costs to be paid by the appellees.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. (Approved by Morrow, C. J.) Filed and entered Nov. 16, 1914. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Order Extending Time for the Filing of a Petition for Rehearing.

Now, on this date, the Court being fully advised, IT IS ORDERED that the appellees in the above-entitled court and cause be allowed to and including the second day of January, 1915, in which to file a petition for rehearing.

It appearing to the Court that this matter having been brought before this Court on the 9th day of December, 1914, and that through an oversight or mistake an order was not entered of record on that date,

It is ORDERED and ADJUDGED by the Court that this order be and the same is hereby entered of that date.

WM. B. GILBERT,
Judge of the Circuit Court of Appeals.

Dated this 23rd day of December, 1914.

[Endorsed]: Filed Dec. 28, 1914. F. D. Monckton, Clerk.

At a stated term to wit, the October Term A. D., 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eigth day of March, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

[Title of Cause.]

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable WILLIAM B. GILBERT, ERSKINE M. ROSS and WILLIAM W. MORROW, Circuit Judges, before whom the case was heard, it is ORDERED that the Petition, filed January 2, 1915, on behalf of the appellees for a Rehearing of the above-entitled cause be, and hereby is denied.

At a stated term, to wit, the October term A. D., 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of March, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

[Title of Cause.]

Order Staying Issuance of Mandate Under Rule 32, To and Including May 3, 1915, etc.

On motion of Mr. Felix T. Smith, on behalf of counsel for the appellees, and good cause therefor appearing, it is ORDERED that the Mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed to and including May 3, 1915, to

enable the appellees to apply to the Supreme Court of the United States for the issuance of a writ of certiorari in said cause.

At a stated term to wit, the October term A. D., 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of SanFrancisco, in the State of California, on Monday, the third day of May, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

[Title of Cause.]

Order Staying Issuance of Mandate Under Rule 32 Until June 7, 1915.

Pursuant to the telegraphic stipulation of counsel for the respective parties, filed therefor, on the first day of May, A. D. 1915, and good cause therefor appearing, it is ORDERED that the issuance of the Mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed until June 7, 1915.

At a stated term, to wit, the October Term A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of June, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM C. VAN FLEET, District Judge; Honorable MAURICE T. DOOLING, District Judge.

[Title of Cause.]

Order Staying Issuance of Mandate Under Rule 32 Until and Including August 6, 1915.

Pursuant to the stipulation of counsel filed therefor on the 29th day of May, A. D. 1915, it is ORDERED that the issuance of the mandate under Rule 32 of this court in the above-entitled cause be, and hereby is stayed until and including the sixth day of August, A. D. 1915.

[Title of Court and Cause.]

Stipulation and Order Withholding Mandate Under Rule 32.

It is hereby stipulated and agreed by and between the appellant and appellees in the above-entitled suit, that the mandate in the above suit may be withheld by the United States Circuit Court of Appeals until Wednesday, October 6th, 1915, and that said man-

date shall not be sent to the United States District Court for the Western District of Washington, until after said date.

G. C. FULTON,
Attorneys for Appellant.
HARRISON ALLEN,
Of Attorneys for Appellee.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: Filed July 30, 1915. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of October, in the year of our Lord one thousand nine hundred and fifteen. PRESENT: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, District Judge.

[Title of Cause.]

Order Staying Issuance of Mandate Under Rule 32 To and Including December 6, 1915.

Pursuant to the stipulation of counsel filed therefor on October 2, 1915, it is ORDERED that the issuance of the Mandate under Rule 32 of this court in

the above-entitled cause be, and hereby is stayed to and including Monday, December 6, 1915.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court U. S.

The above-mentioned appellants, H. S. McGowan, Erick Lindstrom and J. P. Coyle respectfully show that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a decree has been rendered on the 16th day of November, A. D. 1914, reversing the decree of the United States District Court for the Western District of Washington, Southern Division, and that the matter in controversy in said suit exceeds One Thousand ($1,000.00) Dollars besides interest and costs; that this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on an appeal.

WHEREFORE, the said appellants pray that an appeal be allowed them in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said appellants may be reviewed and if error be found, cor-

rected according to the laws and customs of the United States.

FRANKLIN T. GRIFFITH,
HARRISON ALLEN,
R. A. LEITER,
Attorneys for Appellants.

[Endorsed]: Filed Nov. 15, 1915. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Assignment of Errors.

And now comes the appellants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and in connection with their petition for appeal herein, present and file therewith their assignment of errors and say that in the record and proceedings herein, there is manifest error and that the United States Circuit Court of Appeals for the Ninth Circuit erred in this, to wit:

First. In not dismissing the appeal from the District Court, for the reason that said appeal was defective because of the failure to join as a party, the surety upon the injunction bonds, which surety was a necessary party to the appeal.

Second. In holding and deciding that the part of Sand Island and the tide-lands upon the south shore thereof which were held under lease by the appellee, Columbia River Packers' Association, and the waters adjacent thereto and in which the set-net fishing locations of the appellants were situated, were not within the territorial limits of the State of Wash-

ington and that the District Court did not, therefore, have jurisdiction.

Third. In holding and adjudging that under the Act of Congress approved February 14, 1859 (11 Stat. 383, c. 33), the Act of Congress approved February 22, 1889 (25 Stat. 676 c. 180), the Act of Congress of March 2, 1853 (10 Stat. 172, c. 90), and the laws of the United States, the courts of the State of Washington did not have concurrent jurisdiction with the courts of the State of Oregon in a controversy between the citizens of different states in relation to the rights of fishing with set-nets and other appliances in the navigable waters of the Columbia River adjacent to Sand Island and the southerly shore thereof and that the District Court did not, therefore, have jurisdiction.

Fourth. In holding and deciding that the lower court did not have jurisdiction to enter its decree, to grant relief in equity and to make an award of damages when it had personal jurisdiction of all of the parties to the suit.

Fifth. In reversing the decree of the District Court and directing the dismissal of the action upon the ground that the District Court did not have jurisdiction for the reasons as stated in assignments two, three and four.

Sixth. In refusing to uphold that part of the decree of the District Court giving damages to these appellants and restraining the interference with their fishing rights in the waters adjacent to Sand Island and the southerly shore thereof and held by virtue of their fishing licenses lawfully issued to the

appellants by the State of Washington and the State of Oregon.

Seventh. In not holding and adjudging that the appellee, Columbia River Packers' Association, as the lessee of the riparian lands and tide-lands upon the southerly side of Sand Island by virtue of leases from the Secretary of War of the United States made by authority of the Act of Congress approved July 28, 1892 (27 Stat. 321, c. 316) did not have rights in the waters of the Columbia River adjacent to the southerly shore of Sand Island which were superior to the rights of the appellants therein and arising by virtue of the fishing licenses lawfully issued to the appellants by the State of Washington and the State of Oregon.

Eighth. In not holding and adjudging that the appellants had the right to construct and maintain in the waters adjacent to Sand Island under authority of the set-net licenses issued to the said appellants by the State of Washington and the State of Oregon, fixed fishing gear and buoys attached to anchors and that such gear did not constitute an infringement of the right of easement of access and egress to and from the said riparian lands on the southerly side of Sand Island and held under lease by the appellee, Columbia River Packers' Association, from the Secretary of War of the United States nor of any rights of the said appellee, Columbia River Packers' Association.

WHEREFORE, the said appellants pray the Honorable Court to examine and correct the errors assigned and for a reversal of the decree of the

United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case.

FRANKLIN T. GRIFFITH,
HARRISON ALLEN,
R. A. LEITER,
Attorneys for Appellants.

[Endorsed]: Filed Nov. 15, 1915. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Affidavit as to the Amount in Controversy.

State of Oregon,
County of Multnomah,—ss.

H. S. McGowan, being first duly sworn on his oath says: That he is one of the appellants; that he has been engaged in the business of the catching and canning of salmon on the Columbia River for numerous years and is personally acquainted with Sand Island in said river and the conditions which existed there during the times involved in this litigaton and controversy and with the facts in relation thereto; that to the best of his knowledge and belief the fishing rights and the interests in land which are involved in this litigation had an annual rental value in excess of $10,000 and that these appellants by reason of being prevented by the appellees from the exercise of their legal rights in the said locality, and by reason of being prevented from fishing in the said waters during the years from 1908 to 1912, sustained damages which exceed the sum of $10,000; that these fishing rights and interests in lands and the damages

suffered by the appellants by virtue of a deprivation of their said rights during the said years are in controversy in this suit and that the amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

H. S. McGOWAN,

Subscribed and sworn to before me this 11th day of November, A. D. 1915.

[Seal] T. S. ROBINSON,
Notary Public for Oregon.

My commission expires July 28th, 1919.

[Endorsed]: Filed Nov. 15, 1915. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be and hereby is allowed as prayed.

Dated this 13th day of November, 1915.

WM. B. GILBERT,
United States Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Nov. 15, 1915. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, That we, H. S. McGOWAN, as principal and NATIONAL SURETY COMPANY, a corporation duly

authorized and licensed to execute surety bonds in the State of Oregon and all surety bonds required in the United States Circuit Court of Appeals for the Ninth Circuit, as surety, are held and firmly bound unto COLUMBIA RIVER PACKERS' ASSOCIATION AND UNITED STATES FIDELITY AND GUARANTY COMPANY, in the sum of Two Thousand Dollars to be paid to Columbia River Packers' Association and United States Fidelity and Guaranty Co., to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated the 12th day of November, A. D. 1915.

WHEREAS, the appellants in the above-entitled suit have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said case in the Circuit Court of Appeals for the Ninth Circuit on the 16th day of November, A. D. 1914.

NOW, THEREFORE, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise to remain

in full force and virtue.

W. S. McGOWAN, [Seal]
NATIONAL SURETY COMPANY,
By T. S. ROBINSON,
Resident Vice-President.
Attest: M. I. MANN,
Resident Assistant Secretary.
Countersigned at Portland, Oregon,
By M. I. MANN,
Res. Agent.

Executed in the presence of:

LESLIE CRAVEN.
BERT W. HENRY.
LESLIE CRAVEN.
BERT W. HENRY.

The foregoing bond is approved this 13th day of November, A. D. 1915.

[Seal] WM. B. GILBERT,
United States Circuit Judge for Ninth Circuit.

[Endorsed]: Filed Nov. 15, 1915. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

[Title of Court and Cause.]

Praecipe for Transcript of Record on Appeal to Supreme Court U. S.

To the Clerk of Said Court:

Sir: Please make and furnish us with a certified printed transcript of the record (including the proceedings had in said Circuit Court of Appeals) in accordance with the rules of the Supreme Court of the United States and not less than thirty (30)

uncertified copies thereof for use on appeal to the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

1. Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:

2. Motion to Dismiss Appeal and Notice thereof, filed August 21, 1914;

3. Motion for Issuance of New Citation, etc., and Notice thereof, filed September 8, 1914;

4. Order of Submission of Appeal and Motions, entered September 14, 1914;

5. Order Directing Filing of Opionion on Motions, entered October 13, 1914;

6. Opinion on Motions, filed October 13, 1914;

7. Certificate of Clerk of court below Re Date of Filing of Petition to Dismiss for want of jurisdiction, filed October 19, 1914;

8. Order Directing of Opinion, etc., entered November 16, 1914;

9. Opinion, filed November 16, 1914;

10. Decree, filed and entered November 16, 1914.

11. Order Allowing Appellees to January 2, 1915, to file Additional Rehearing, etc., filed December 28, 1914.

12. Order, Denying Petition for Rehearing, entered March 8, 1915.

13. Petition for Allowance of Appeal to the Supreme Court of the United States, filed November 15, 1915.

14. Assignment of Errors on said Appeal, filed November 15, 1915.

15. Affidavit as to Amount in Controversy, filed November 15, 1915.

16. Order Allowing Appeal to the Supreme Court of the United States as prayed, filed November 15, 1915.

17. Bond on said Appeal in the sum of $2,000.00, filed November 15, 1915.

18. Citation on said Appeal.

19. All orders entered staying issuance of mandate.

20. Praecipe for Record on said Appeal.

Please transmit such certified printed transcript of the record, together with all original exhibits heretofore received by your office, in the above-entitled cause, to said Supreme Court of the United States.

Please prepare the thirty or more uncertified printed copies of said record, by printing thirty or more copies of the above-mentioned proceedings, that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings at the end of each of the thirty or more extra copies of the printed transcript of record, on which said cause was heard in said Circuit Court of Appeals.

FRANKLIN T. GRIFFITH,
R. A. LEITER,
HARRISON ALLEN,
Attorneys for Appellants.

Due service of the within praecipe is hereby accepted in Clatsop County, Oregon, this 30th day of November, 1915, by receiving a copy thereof, duly certified to as such by Harrison Allen, of attorneys for appellants.

G. C. FULTON,

Attorney for Columbia River Packers' Association, a Corporation.

G. C. FULTON,

Attorney for United States Fidelity & Guaranty Company.

[Endorsed]: Filed Dec. 15, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2396.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and nineteen (819) pages, numbered from and including 1 to and including 819, to be a full, true and correct copy of the complete record made pursuant to the praecipe filed by counsel for the appellant on the 15th day of December, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinions, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying original exhibits, marked as follows:

Plaintiff's "A" to "D," inclusive, and "F" to "G," inclusive;

Defendants' "A" to "G," inclusive, and 1 to 25, inclusive;

constitute the Transcript of Record on appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said praecipe.

ATTEST my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, at the City of San Francisco, in the State of California, this twenty-first day of December, A. D. 1915.

[Seal] F. D. MONCKTON.
Clerk.
By Meredith Sawyer,
Deputy Clerk.

[Canceled U. S. Internal Revenue 10-cent Documentary Stamp.]

United States Circuit Court of Appeals for the Ninth Circuit.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE, Appellants,
vs.
COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation, and UNITED States Fidelity and Guaranty Company, a Corporation, Appellees.

Citation.

THE UNITED STATES OF AMERICA,
Ninth Circuit:

To Columbia River Packers' Association and United States Fidelity and Guaranty Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein H. S. McGowan, Erick Lindstrom and J. P. Coyle are appellants and you are the appellees, to show cause, if any there be,why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit this 12th day of November, A. D. 1915.

WM. B. GILBERT,
Judge of United States Circuit Court of Appeals, Ninth Circuit.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within citation is hereby accepted this 15th day of November, 1915, by receiving a copy thereof duly certified to as such by Harrison Allen, one of attorneys for appellants.

G. C. FULTON,
Attorney for Appellee.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within citation is hereby accepted at Portland, Oregon, this — day of November, 1915, by receiving a copy thereof duly certified to as such by Harrison Allen, one of attorneys for appellants.

——— ———,
Resident Agent of United States Fidelity & Guaranty Co. for Oregon.

ATE OF OREGON,
County of Multnomah, ss:

Leslie Craven, being duly sworn says that he is a citizen of the State Oregon and a resident of Portland and that on this 16th day of vember, 1915, at Portland, Oregon, he served the foregoing citan on John L. Hartman, the resident agent of the United States delity & Guaranty Co. for Oregon and the agent of the said comny in the said state for the purpose of service of papers as proed by the laws of Oregon, by delivering a certified copy of the d citation to him personally and leaving the same with him.

LESLIE CRAVEN.

Subscribed and sworn to before me this 16th day of November, 15.

[Seal of T. S. Robinson, Notary Public, State of Oregon.]

T. S. ROBINSON,
Notary Public for Oregon.

My commission expires July 28th, 1919.

[Endorsed:] Docketed. No. 2396. United States Circuit Court of ppeals for the Ninth Circuit. H. S. McGowan, Erick Lindstrom d J. P. Coyle, appellants, vs. Columbia River Packers' Association, corporation, and United States Fidelity and Guaranty Co., a corration, appellees. Citation. Filed Nov. 22, 1915. Frank D. ncton, Clerk U. S. Circuit Court of Appeals, for the Ninth Cirit. By Meredith Sawyer, Deputy Clerk. Franklin T. Griffith, rrison Allen, Attorneys for Appellants, 808 Electric Building, rtland, Oregon.

Endorsed on cover: File No. 25,069. U. S. Circuit Court Appeals, n Circuit. Term No. 786. H. S. McGowan, Erick Lindstrom, and P. Coyle, appellants, vs. Columbia River Packers' Association and nited States Fidelity and Guaranty Company. Filed January n, 1916. File No. 25,069.

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APPELLANTS' BRIEF

Supreme Court of the United States

OCTOBER TERM, 1915

No. 786

H. S. McGOWAN, ERICK LINDSTROM AND J. P. COYLE

Appellants

vs.

COLUMBIA RIVER PACKERS' ASSOCIATION AND UNITED STATES FIDELITY AND GUARANTY COMPANY

Appellees

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

---

This suit comes to this court on an appeal from the decree of the United States Circuit Court of Appeals for the Ninth Circuit, where the suit was heard upon an appeal from the District Court of the Western District of Washington. The suit was instituted in the Circuit Court of the United States for the Western District of Washington, and when that

court was abolished, the suit was transferred to the District Court in that district.

STATEMENT OF THE ISSUES.

Appellee, Columbia River Packers' Association, filed its bill of complaint in the Circuit Court of the United States for the Western District of Washington on the 7th day of July, 1908, and thereafter it filed its amended bill of complaint (Trans., p. 4), in which it alleged, in substance, that said appellee was a corporation duly organized under the laws of the State of Oregon, and had complied with the laws of the State of Washington entitling it to transact business in that state; that the appellants, and each of them, were citizens and residents of the State of Washington; that the United States of America was the owner, in fee, of Sand Island, a small island in the Columbia River, near its mouth, in Pacific County, Washington, *together with all tide lands, water rights, privileges and easements* surrounding and adjacent thereto and bordering thereon; that said Sand Island, by proclamation of the President of the United States, published on the 29th day of August, 1863, *was reserved, from entry and sale, for military purposes,* and the same has ever since been held as such by the United States. That pursuant to an act of Congress approved July 23, 1892 (27 Stat. at L. 321), granting authority to the Secretary of War, in his discretion, to lease for

a period not to exceed five years, *such property of the United States under his control* as should not for the time being be required for public use, the Secretary of War of the United States on the 1st day of May, 1908, said Sand Island then being under the control of said Secretary of War, and then not required for public use, by writing duly executed and approved, in the manner provided by law, duly leased to the appellee, for a good and valuable consideration, the following portion of Sand Island, the same being designated on the maps and plats of the government survey, as Sites No. Two and Three, for the term of three years from said date, together with the tide lands, water rights, *fishing rights* and riparian rights *adjacent thereto to the navigable channel* of said Columbia River; which said portion of said island so leased, as aforesaid, and being Sites Nos. Two and Three, was and is all the frontage, tide lands, riparian rights, water rights and privileges south and the high lands north of a line drawn on the line of low-water mark on the Columbia River, at the south side of said island, beginning at a point 4,000 feet easterly along low-water mark, from a point on low-water mark due west of United States Monument No. 4, erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to the east boundary line of Site No. Four on said Sand Island, said point being a

point on said low-water line that would intersect a north and south line 781 feet distant, east of United States Monument No. 6, erected on Sand Island by the United States Government surveyors, and so marked.

Appellee further alleged that Sand Island is entirely of sand, not susceptible of cultivation, practically no vegetation grows upon it, and it contains no minerals, and its south shore is washed by the main ship channel of the Columbia River; that said premises are of great value for *the right of fishery* and to haul and land seines thereon, and were leased to said appellee by the United States for the sole purpose of being used as a fishery, and of operating seines for catching salmon fish in the waters of said river; that under the laws of the United States, said waters are required to be kept free from obstruction, and by reason of said laws and of said lease, said appellee is entitled to have the waters in front of Sites Nos. Two and Three and to the channel of the river free and unobstructed, is entitled to the free and unobstructed ingress to and egress from said premises, and is entitled to the exclusive right of operating seines for the purpose of catching salmon fish in the waters of said river, and landing the same on said shores.

Said appellee further alleged that on the 30th day of June, 1908, the Fish Commissioner of the State of Washington duly issued to said appellee

licenses to operate three seines in the Columbia River within said state for a period of one year thereafter; that on or about the second day of July, 1908, the appellants wrongfully and unlawfully, and without said appellee's consent, placed seven obstructions in the navigable waters of the Columbia River, directly in front of said leased premises, consisting of large stones, to which were attached wire cables and chains, and large timbers for a buoy, which obstructions prevented said appellee from operating its seines in front of said premises and excluded the public generally from operating either gill nets, drift nets or seines in said waters; that on the 2d day of July, 1908, said appellee removed said obstructions, and on the 4th day of July, 1908, appellants wrongfully and unlawfully, without said appellee's consent, placed six more of said obstructions in front of said premises, in practically the same location as that of the former obstructions; that said obstructions were in the navigable waters of the Columbia River, and were so placed as to prevent the free ingress to and egress from said premises, and were not placed there for the purpose of trade or commerce, but were so placed for the purpose of harassing and annoying said appellee, and of preventing it from operating its seines, and of obstructing the free ingress to and egress from said premises; that appellants, unless restrained by the court, will continue to place other obstructions in the waters in front of

said premises, and prevent said appellee from operating its seines in said waters.

Appellee further alleged that it had expended fully $15,000 for seining appliances, employed thirty-four men and was keeping and caring for twenty-four horses, all of which was necessary in operating seines in front of said premises; that the maintenance of said outfit requires a daily expenditure of $200, and said appellee pays $5,175 per annum to the United States as rental for said premises. That said trespass was a continuing trespass, and said appellee will be irreparably damaged thereby, and has no adequate remedy at law, and said appellee prayed for a temporary restraining order, injunction and general relief.

An injunction bond in the sum of $2,000 (Trans., p. 17), executed by said appellee as principal, and appellee, United States Fidelity and Guaranty Company, as surety, was filed, and thereafter an additional bond in the sum of $10,000 (Trans., p. 18), executed by the same parties as principal and surety, was filed, and a restraining order (Trans., p. 20) was issued in accordance with the prayer of appellee's amended bill of complaint.

The appellants each filed separate answer and defense and cross-bill.

The appellant, H. S. McGowan, in his answer (Trans., p. 23), by special denial, duly denied all of the allegations of appellee's amended bill of complaint, except that he admitted the organiza-

tion of appellee, Columbia River Packers' Association, under the laws of the State of Oregon, and its compliance with the laws of the State of Washington; the citizenship and residence of appellants; that Sand Island is an island situated in the Columbia River, in Pacific County, Washington; that the Secretary of War of the United States did execute what purports to be a lease to appellee of said Sites Nos. Two and Three; that on or about the 30th day of June, 1908, appellee procured three fishing licenses from the Fish Commissioner of Washington, entitling it to operate three seines in the waters of the Columbia River generally; that salmon fish are of great value and ascend the Columbia River at certain seasons of the year in large numbers.

Said appellant in his answer alleged that on the 15th day of April, 1908, he procured two fishing licenses from the Fish Commissioner of the State of Washington, authorizing him to place set nets in the waters of the Columbia River in front of Sites Nos. Two and Three on Sand Island, and on the 16th day of June, 1908, he located each of said set nets below extreme low-tide line in the waters of the Columbia River in front of said Sites Nos. Two and Three, by placing two buoys on each set net location, each buoy being a stone anchor weighing about 300 pounds, attached by a small wire cable, about 25 feet long, to a cedar buoy, about four feet long and eight inches square, bearing the license numbers painted in large letters, in the waters in

front of said sites, as required by law; and on the 2d day of July, 1908, was engaged in fishing with set nets upon said locations, and continued to fish, as aforesaid, until prevented by appellee and the injunction in this suit; that said set nets, with their anchors and buoys, are the obstructions complained of in said appellee's amended bill of complaint, and are about 700 feet apart in navigable waters of the Columbia River; that in the year 1902 said appellant purchased the right to fish in said location from persons who had owned and operated said fishery for a long number of years prior thereto, and said appellant fished in said location during the fishing season of each year from 1902 to 1907, inclusive, and by reason of his said fishing licenses has the exclusive right to fish on said locations and will continue to fish said set nets in said locations, unless restrained by the court; that neither the United States nor the Secretary of War had any power to lease any fishing rights or riparian rights in front of said sites, and did not so lease to appellee, but the lease mentioned in the amended complaint covered the land as far out as low-water mark only and did not and could not convey anything beyond low-water mark.

Said appellant, by way of separate answer and defense (Trans., p. 56), alleged, in addition to the citizenship and residence of the parties, that on the 15th day of April, 1908, he procured two set net licenses from the Fish Commissioner of the State of

Washington, to operate two set nets in the Columbia River, and on the 16th day of June, 1908, he located each of said licenses by securely anchoring a buoy, with the license numbers posted thereon, one at a point in the Columbia River in Pacific County, Washington, about 700 feet easterly from what is commonly called "Great Republic Wreck," in front of Sand Island and between the line of extreme low tide and the adjacent channel of the Columbia River, and the other about 200 feet easterly from said Great Republic Wreck and between the line of extreme low tide and Hanbury harbor line, marking the adjacent channel of the Columbia River, and each of said set nets was located by the use of a stone anchor weighing about 300 pounds, to which was attached a wire cable, about 25 feet long, to which was attached a cedar buoy, about four feet long, as required by law, and said appellant, on the 16th day of June, 1908, placed set nets on said locations and operated each of said set nets continuously for the purpose of catching salmon fish until prevented from so doing by said appellee, as hereinafter alleged; that each of said set nets was made of rope, twine, cord and lead and was securely fastened, so that it remained in said location and fish were caught in the same, by entangling themselves in said nets, and were then taken out of said nets by men in small boats afloat on the water. That in accordance with the laws of the State of Washington, said appellant is entitled to

300 feet lateral passageway and 30 feet end passageway for each of said set nets, and each of said locations is very valuable, because of the salmon fish to be caught there in the year 1908 and future years; that said appellant has fished in the location of said set nets during the fishing season of each year from 1902 to 1907, inclusive, and long prior to the time that said appellee commenced fishing in said location, for that said appellee did not commence to fish in said location until about the 2d day of July, 1908; that in fishing with said set nets upon said locations it is not necessary to trespass upon the shore or Sites Nos. Two and Three, and said nets do not interfere with the navigation of the river or with the ingress to and egress from said sites; that each of said appellant's set nets and the rights to fish the same upon the said location is of the reasonable value of $10,000, and will catch a great many valuable salmon fish, the exact number and value of which it is impossible to determine.

Said appellant further alleged that on or about the 2d day of July, 1908, and at other subsequent times, said appellee wrongfully and unlawfully and without the consent of said appellant, entered upon the lateral and end passageways of said set nets and hauled its seines and fished over said locations, and caught valuable salmon fish, which otherwise would have been caught by said appellant's set nets, and said appellee daily continues to fish over said locations with said seines, to the great and

irreparable damage of this appellant; that up to the present time this appellant has been damaged in the sum of at least $20,000, and said trespass is a continuing trespass, and said appellant has no adequate remedy at law and prayed for general relief.

Said appellant, by way of cross-bill (Trans., p. 73), set out the same facts which are set out in his separate answer and defense, and in addition thereto alleged that he has been damaged in the sum of at least $20,000 by reason of the restraining order heretofore issued on behalf of said appellee, and by reason of the trespass upon his said set-net locations, and prayed that the claims of said appellee in and to said set-net locations be declared null and void, and the rights of said appellant thereto be confirmed for judgment in the sum of $20,000, injunctive relief and general relief.

Appellants Erick Lindstrom and J. P. Coyle each filed a separate answer and defense and cross-bill, which were in all respects like those filed by appellant H. S. McGowan, except the names and license numbers and set-net locations. Appellant Lindstrom had three set-net locations, appellant Coyle three set-net locations and appellant McGowan two, all of which were in the waters of the Columbia River in front of said Sites Nos. Two and Three.

Said appellee interposed a demurrer (Trans., p. 94) to appellants' cross-bills upon the grounds (a) that the court is without jurisdiction to hear said cross-bills; (b) that said cross-bills do not con-

tain any matter of equity; (c) that the same matter is pleaded by appellants in their separate answers and defenses.

The demurrer was overruled (Trans., p. 96), and said appellee filed its answer (Trans., p. 97) to the cross-bills of said appellants, duly denying, by a special denial, all the allegations of said cross-bills, except it admitted that said appellants procured fishing licenses authorizing them to fish generally in the Columbia River, and that they placed certain obstructions in front of Sites Nos. Two and Three, which they claimed to be set-net locations. Said appellee alleged that a set net could not be maintained in the waters of the Columbia River upon said location, and if so maintained, could not catch fish. The appellants duly filed replication (Trans., p. 120), denying generally the new matter set out in said appellee's answer.

Appellee Columbia River Packers' Association having enjoyed the exclusive right to fish upon said premises for nearly a year, by reason of the injunction in this case, thereafter filed its petition (Trans., p. 126), alleging that since the institution of this suit the Supreme Court of the United States had decided that Sand Island was in the State of Oregon; that it had instituted said suit in the Federal Court in Washington in the belief that Sand Island was located in said State of Washington, but by reason of said Sand Island being in the State of Oregon, this court has no jurisdiction of this suit,

and prayed a dismissal of the suit, without prejudice. The petition was resisted by appellants, and the court denied the prayer of said petition (Trans., p. 130), on the ground that the courts of the State of Washington had concurrent jurisdiction with the courts of the State of Oregon on the Columbia River, and, therefore, had jurisdiction of this action. Thereafter said appellee filed its supplemental bill of complaint (Trans., p. 149), and therein restated the allegations of its amended bill of complaint and suggested to the court that it did not have jurisdiction of said action, and prayed for the relief prayed for in its said amended bill of complaint.

The appellants each filed a supplemental answer, affirmative defense and cross-bill, in which they restated all the allegations of their former pleadings, and in addition thereto alleged that they had renewed said set-net licenses from the State of Washington from year to year since 1908, and on the 19th day of June, 1908, procured four set-net fishing licenses from the Master Fish Warden of the State of Oregon, authorizing said appellants to operate four set nets in the waters of the Columbia River in front of said Sites Nos. Two and Three, and thereupon located said set-net licenses upon the same locations formerly made under the Washington licenses, and in said supplemental cross-bills said appellants asked for the same relief as prayed for in their cross-bills.

In the preparation of the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, for the purpose of shortening the record, it was stipulated (Trans., p. 124) by the parties that the pleadings of the appellants Lindstrom and Coyle were the same as those of appellant McGowan, with the exception of the names and license numbers and places of location, and that the pleadings of said appellee, in reply thereto, were the same as those in reply to appellant McGowan's pleadings, with the exception of the names and license numbers and places of location, and for the purposes of said record the pleadings of appellant H. S. McGowan and the pleadings of appellee Columbia River Packers' Association directed against the same shall be deemed also to be the pleadings of appellants Lindstrom and Coyle, and of appellee directed against the same, subject only to variation as to names, license numbers and places of location. For the same reason it was agreed that the original bill of complaint be omitted from the record.

Contention of the Parties.

The appellee Columbia River Packers' Association contended that it had the right to sweep over every square foot of the bed of the Columbia River in front of said Sites Nos. Two and Three, from the shore out to the main ship channel, with its seines, and to remove anything which interrupted the sweep of such seines, and based such rights upon (a) an

act of Congress approved July 23, 1892 (27 Stat. at L., 321), and the lease (Plaintiff's Exhibit "E," Trans., p. 717), executed by the Secretary of War of the United States under the provisions of said act; and (b) fishing license from the State of Washington issued on the 30th day of June, 1908.

The appellants contended that they had the right to fish with set nets between extreme low-tide line and the navigable channel of the Columbia River, in front of said Sites Nos. Two and Three in the places located and marked by anchors and buoys, and to prevent all persons from destroying, or in anywise molesting said set nets, and based such rights upon (a) fishing licenses issued by the State of Washington on the 15th day of April, 1908, and the location of fishing places under such licenses on the 16th day of June, 1908; and (b) fishing licenses issued by the State of Oregon on the 19th day of June, 1908. Appellants further contended that the Congress of the United States had no power to lease any fishing rights in the waters of the Columbia River below extreme low-tide line in front of said sites, for the reason that such rights of fishery are under the control of the states of Washington and Oregon, and appellants having obtained grants from both states, prior to any grant to appellee, are prior in right and, therefore, should prevail.

Proceedings Had.

Evidence in regard to the injunctive relief was heard by the court, and a decision (Trans., p. 166) was rendered on the 24th day of January, 1912, and an interlocutory decree (Trans., p. 173) was entered on the 5th day of February, 1912, denying appellee's prayer for injunction and granting an injunction to said appellants, restraining said appellee from interfering with said set nets, and the court appointed a special master to take evidence in regard to the damage. The special master took evidence on the question of damages and thereafter presented findings of fact and conclusions of law (Trans., p. 179), to the effect that appellants were entitled to a judgment against said appellee in the sum of $22,360. Said appellee duly excepted (Trans., p. 184) to the finding and report of said special master, and thereafter the court rendered its decision (Trans., p. 190), confirming said report and findings of fact and conclusions of law, except that the amount of damages was reduced to $22,083, and thereupon a final decree (Trans., p. 197) was entered, permanently enjoining appellee from interfering with appellants' set nets and for damages against said Columbia River Packers' Association in the sum of $22,083, and against its surety, United States Fidelity and Guaranty Company, to the full amount of its undertaking. Thereafter an appeal was taken by said appellees (Trans., p. 726) from the final judgment and decree to the Circuit Court

of Appeals for the Ninth Circuit. Upon a hearing in said Circuit Court of Appeals the court decided (Trans., p. 772) that the Circuit Court in the first instance did not have jurisdiction over the cause of action, and ordered that the suit be remanded, with directions to dismiss the bill, and these appellants have appealed to this court from the final decision of said Circuit Court of Appeals for the Ninth Circuit.

Descriptions.

Sand Island is about three miles long and a little more than one-half mile wide, is entirely of sand and has no vegetation upon it except some weeds and grass, and there are no buildings upon it, except temporary sheds used during the fishing season. North of the island and to the Washington shore there is no deep-water channel, but the sands are almost bare at low tide, and on the south side of the island the shore is smooth and sandy and slopes gradually out to the main ship channel of the Columbia River. The main ship channel is about 2,000 feet from the low-water line on Sites Nos. Two and Three, is about 40 feet deep and more than a mile wide. When the ocean tide sets in the current runs up stream and the water rises about seven and one-half feet. The sites which were leased by the Secretary of War to appellee Columbia River Packers' Association are situated on the south side of the island and are described as follows (Map, Trans., p. 723):

Site No. One. The north boundary is marked by a line drawn due west from United States Monument No. 4 to the intersection with the low-water line. The east boundary is marked by a line due south from a point 1,413.5 feet due west of United States Monument No. 4 to the intersection with low-water line. The length of low-water shore line is approximately 4,000 feet.

Site No. Two. The west boundary corresponds with the east boundary of Site No. One. The east boundary is marked by a line due south from United States Monument No. 5 to low-water line. The length of shore line is approximately 3,500 feet.

Site No. Three. The west boundary corresponds with the east boundary of Site No. Two. The east boundary is marked by a line due south to low water from a point 781 feet due east of United States Monument No. 6. The length of shore line is approximately 3,500 feet.

The seines used by appellee in front of Sites Nos. Two and Three are from 1,800 feet to 2,400 feet in length and taper from 50 feet deep at the head end to ten feet deep at the tail end. They are made of cotton twine, with meshes differing in size from three and one-half inches to five and one-half inches, stretch measure. The seine is coiled up on a seining skiff and horses are hitched to the tail end of the seine and hold it upon the shore while the skiff is towed out at right angles to the shore, to the full length of the seine, by a gasoline launch. The

tide carries the seine up or down, as the case may be, and the launch carries a long head line around ahead of the seine to the shore. When the seine has been carried far enough, both ends are hauled on the shore by horses, until the fish are surrounded and forced upon the shore and captured. The sweeps of the seine depend upon the tide. At times the whole front of Sites Nos. Two and Three will be covered by a single sweep of the seine, while at other times a very small portion of it will be swept over.

A set net is made of linen twine, with meshes about eleven inches, stretch measure; is hung with lead and cork lines and is attached at either end to an anchor or other stationary object. It is set in the water more or less at right angles with the stream, and the salmon fish, in ascending the stream, put their heads into the meshes and are caught by the gills. The net is lifted up and the fish are taken out of it and put into a boat. The length and width of a set net depends entirely upon the fishing place, those proposed to be used by these appellants being about 300 feet long.

Specifications of Error.

Appellants allege that the decree of the United States Circuit Court of Appeals for the Ninth Circuit is erroneous in the matters specified in appellants' assignment of errors (Trans., p. 810), and is further erroneous in the following particulars, to-wit:

First. The court erred in holding and deciding that the Circuit Court of the United States for the Western District of Washington, Western Division, did not have jurisdiction of this suit, upon the grounds (a) that said court had concurrent jurisdiction with the courts of Oregon over the cause of suit; (b) that said court had jurisdiction over the persons of the parties.

Second. The court erred in not holding that appellee Columbia River Packers' Association did not acquire fishing rights in the waters of the Columbia River below extreme low-tide line, in front of Sites Nos. Two and Three, on Sand Island, under the act of Congress approved July 23, 1892 (27 Stat. at L., 321), and the lease (Plaintiff's Exhibit "E"; Trans., p. 717), executed by the Secretary of War of the United States under the provisions of said act.

Third. The court erred in not holding that appellee Columbia River Packers' Association did not show an infringement of its right of access to and from the navigable water in front of said Sites Nos. Two and Three by appellants in placing set nets in the waters in front of said sites.

Fourth. The court erred in refusing to uphold that part of the decree of the District Court giving damages to these appellants, and restraining the interference with their fishing rights in the waters adjacent to Sand Island and the southerly shore thereof, and held by virtue of their fishing licenses

lawfully issued to the appellants by the State of Washington and the State of Oregon.

Fifth. The court erred in not holding and adjudging that the appellee Columbia River Packers' Association, as the lessee of the riparian lands and tide lands upon the southerly side of Sand Island by virtue of leases from the Secretary of War of the United States made by authority of the Act of Congress approved July 28, 1892 (27 Stat., 321, c. 316), did not have rights in the waters of the Columbia River adjacent to the southerly shore of Sand Island which were superior to the rights of the appellants therein and arising by virtue of the fishing licenses lawfully issued to the appellants by the State of Washington and the State of Oregon.

Sixth. The court erred in not holding and adjudging that the appellants had the right to construct and maintain in the waters adjacent to Sand Island under authority of the set-net licenses issued to the said appellants by the State of Washington and the State of Oregon, fixed fishing gear and buoys attached to anchors, and that such gear did not constitute an infringement of the right of easement of access and egress to and from the said riparian lands on the southerly side of Sand Island and held under lease by appellee Columbia River Packers' Association from the Secretary of War of the United States, nor of any rights of the said appellee Columbia River Packers' Association.

POINTS AND AUTHORITIES.

I.

This court has jurisdiction to hear this appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Vicksburg v. Hinson, 231 U. S. 259; 58 L. Ed. 209.

N. P. Ry. Co. v. Soderberg, 188 U. S. 525; 47 L. Ed. 575.

Wilson C. Co. v. Del Pozo y Marcos, 236 U. S. 635; 59 L. Ed. 758.

Doolan v. Carr, 125 U. S. 618; 31 L. Ed. 844.

Cummings v. Chicago, 188 U. S. 410; 47 L. Ed. 525.

II.

The Circuit Court of the United States for the Western District of Washington had jurisdiction concurrent with the courts of Oregon on the Columbia River and in this suit.

10 Stat. at L., 172.

11 Stat. at L., 383.

Nielson v. Oregon, 212 U. S. 315; 53 L. Ed. 528.

In re Mattson, 69 Fed. 535.

State v. Nielson, 51 Ore. 588; 95 Pac. 720.

McFall v. Commonwealth, 2 Met. (Ky.), 394.

Carlisle v. State, 32 Ind. 55.

Gilbert v. Moline W. P. Co., 19 Iowa, 319.

Sherlock v. Alling, 44 Ind. 184.

State v. Mullins, 35 Iowa, 199.

State v. Metcalf, 65 Mo. App. 681.

Roberts v. Fullerton, 117 Wis. 222; 93 N. W. 1111.

Memphis C. P. Co. v. Pikey, 142 Ind. 304; 40 N. E. 527.

Welch v. State, 126 Ind. 71; 25 N. E. 883.

Opsahl, Admtx., v. Judd, 30 Minn. 126; 14 N. W. 575.

Saunders v. St. Louis Ry., 97 Mo. 26; 10 S. W. 595.

State v. Moyers, 155 Iowa, 678; 136 N. W. 896.

Keater Lbr. Co. v. St. Croix Boom Co., 72 Wis. 62; 38 N. W. 529.

Dugan v. State, 125 Ind. 130; 25 N. E. 171.

Wiggins Ferry v. Reddig, 24 Ill. App. 260.

Harrell v. Speed, 113 Tenn. 224; 81 S. W. 840.

State v. Fraudre, 54 W. Va. 122; 46 S. E. 269.

III.

The United States Circuit Court for the Western District of Washington had jurisdiction of this suit by reason of its jurisdiction over the parties, regardless of the *situs* of the property.

Massie v. Watts, 6 Cranch. 148; 3 L. Ed. 181.

Muller v. Dows, 94 U. S. 444; 24 L. Ed. 207.

Phelps v. McDonald, 99 U. S. 298; 25 L. Ed. 473.

Cole v. Cunningham, 133 U. S. 107; 33 L. Ed. 538.

Phila. Co. v. Stimson, 223 U. S. 605; 56 L. Ed. 570.

Robertson v. Howard, 229 U. S. 254; 57 L. Ed. 1174.

Lewisville N. R. Co. v. W. U. Tel. Co., 207 Fed. 1.

Jennings v. Beale, 157 Penn. St. 630; 27 Atl. 948.

Schmaltz v. York Mfg. Co., 204 Pa. 1; 53 Atl. 522.

Kirklin v. Atlas S. & L. Assn. (Ch. App. Tenn.), 60 S. W. 149.

Allen v. Buchanan, 97 Ala. 399; 11 So. 777.

Steele v. Bryant, 132 Ky. . . ; 116 S. W. 755.

IV.

The appellee Columbia River Packers' Association did not acquire any fishing rights in the waters of the Columbia River below extreme low-tide line in front of Sites Nos. Two and Three by the Act of Congress approved July 23, 1892 (27 Stat. at. L., 321), and the lease of a part of the island (Plaintiff's Exhibit "E"; Trans., p. 717), executed by the Secretary of War.

27 Stat. at L., 321.

Plaintiff's Exhibit "E"; Trans., p. 717.

Smith v. Maryland, 18 How. 71.

15 Law Ed. 269.

McCready v. Virginia, 4 Otto, 391; 24 L. Ed. 248.

Shively v. Bowlby, 152 U. S. 1; 38 L. Ed. 331.

Hume v. Rogue River Pack. Co., 51 Ore. 237; 92 Pac. 1065.

Pac. Steam Whaling Co. v. Alaska Pack. Assn., 138 Cal. 632; 72 Pac. 161.

Whitehead v. Cape Henry Synd., 105 Va. 463; 54 S. E. 306.

V.

The right to fish in the navigable waters of the Columbia River is a common public right of property and of citizenship of the citizens of the states of Oregon and Washington, and is subject to regulation and control by said states.

Martin v. Waddell, 16 Peters, 367; 10 L. Ed. 997.

Smith v. Maryland, 18 How. 71; 15 L. Ed. 269.

McCredie v. Virginia, 4 Otto, 391; 24 L. Ed. 248.

Shively v. Bowlby, 152 U. S. 1; 38 L. Ed. 331.

Hume v. Rogue River Pack. Co., 51 Ore. 237; 92 Pac. 1065.

Pacific Steam W. Co. v. Alaska P. Assn., 138 Cal. 631; 72 Pac. 161.

Hampton v. Columbia Canning Co., 3 Alaska, 100.

Baron v. Alexander, 4 Alaska, 591.

Lincoln v. Davis, 53 Mich. 375; 19 N. W. 103.

Ainsworth v. M. H. & F. Club, 153 Mich. 185; 116 N. W. 992.

Stewart v. Greanyea, 154 Mich. 132; 117 N. W. 655.

Willow River Club v. Wade, 100 Wis. 86; 76 N. W. 273.

Roberts v. Fullerton, 117 Wis. 222; 93 N. W. 1111.

Diana Club v. Husting (Wis.), 145 N. W. 816.

Fuller v. Shedd, 161 Ill. 462; 44 N. E. 286.

Sloan v. Biemiller, 35 Ohio St. 492.

Bodi v. Club, 57 Ohio St. 226; 48 N. E. 944.

Concord Co. v. Robertson, 66 N. H. 1; 25 Atl. 718.

Taylor v. Commonwealth, 102 Va. 759; 47 S. E. 875.

Whitehead v. Cape Henry Synd., 105 Va. 463; 54 S. E. 306.

VI.

The right of access from the shore to navigable water is subject to the public rights of navigation and fishery, and the shore owner will be held to a reasonable exercise of his rights of access where the same interfere with the public rights of fishery.

Baron v. Alexander, 4 Alaska, 591.

Hampton v. Columbia Can. Co., 3 Alaska, 100.

Yates v. Milwaukee, 10 Wall. 497; 19 L. Ed. 984.

Atlee v. N. W. Packet Co., 21 Wall. 389; 22 L. Ed. 619.

U. S. v. Chandler-Dunbar W. P. Co., 229 U. S. 53; 57 L. Ed. 1063.

Greenleaf-Johnson v. Garrison, 237 U. S. 251; 59 L. Ed. 939.

Hedges v. West Shore Ry. Co., 150 N. Y. 150; 44 N. E. 691.

Ferry Pass I. & S. A. v. White River I. & S. A., 57 Fla, 399; 48 So. 643.

Oelsner v. Nassau L. & P. Co., 118 N. Y. Supp. 960.

Allen v. Allen, 19 R. I. 114; 32 Atl. 166.

VII.

The fishing rights of appellants, based upon grants from the states of Washington and Oregon, are prior in time and superior in right to the rights of appellee, based on a grant from the State of Washington only, and subsequent in time to both grants to appellants.

Qui Prior Est Tempore, Prior Est Jure.

Secs. 5187, 5211, 5214, Rem. & Bal. Code of Washington.

Secs. 5237, 5298-A, 5304, Lord's Oregon Laws.

VIII.

The injunction issued on behalf of appellee Columbia River Packers' Association was wrongfully issued, and appellants are entitled to recover actual compensatory damages from the appellees, not exceeding, however, the amount of the undertaking as against the surety, United States Fidelity & Guaranty Company.

Pacific S. W. Co. v. Alaska P. Assn., 138 Cal. 632; 72 Pac. 161.

Russell v. Farley, 105 U. S. 433; 26 L. Ed. 1060.

Meyers v. Block, 120 U. S. 206; 30 L. Ed. 642.

ARGUMENT.

I.

This Court Has Jurisdiction to Hear This Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

Federal questions are involved in this suit which give this court jurisdiction to hear the appeal from the judgment of the United States Circuit Court of Appeals of the Ninth Circuit, under Section 241 of the New Judicial Code.

The first bill of complaint which was filed in this suit is not in the record, but the matters and things which controlled the jurisdiction of the lower court are set out in the amended complaint and will be considered by this court in determining the jurisdiction of this court on appeal.

Vicksburg v. Hensen, 231 U. S. 259; 58 L. Ed. 209.

We have in mind the well-established rule of law that if the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship alone, then the judgment of the Circuit Court of Appeals is final; but if the jurisdiction in the first instance was invoked to determine a federal question in addition to diverse citizenship, then that judgment is not final.

If the court will turn to the amended complaint (pages 4 to 16, inclusive, of the Tran. of Record), at paragraph IV thereof, where the claims of ap-

pellee, complainant below, are set out, it will be seen that complainant claimed that Sand Island was withdrawn from the public domain and from entry or purchase under the public land laws, and was reserved to the government of the United States as a military reservation, by proclamation of the President of the United States issued in 1863; that by the Act of Congress of July 23, 1892 (27 Stat. at L., 231) Congress authorized the Secretary of War of the United States to lease the island; that thereafter the Secretary of War caused certain fishing sites on the shores of the island to be surveyed and their boundaries marked, and that the Secretary of War thereafter leased to said complainant not only the land to low-water mark, but also the exclusive right to fish in the waters of the Columbia River in front of said sites from low-water mark on said sites out to the center of the main ship channel; and that these plaintiffs in error trespassed upon such rights by placing obstructions in the water in front of said sites. Complainant also claimed that the obstructions so placed in the water in front of said sites were placed there in violation of the Constitution and laws of the United States forbidding the obstruction of navigable waters.

These appellants, by way of answer to the bill of complaint (pages 23 to 94, inclusive, Tran. of Record), denied complainant's alleged rights in the waters in front of said sites below low-water mark, and particularly they denied that complainant ac-

quired any fishing rights by reason of its lease of said premises from the Secretary of War, or otherwise, or that the alleged obstructions so placed in said waters interfered with the navigation of the river, and by way of cross-bill they set up the right in themselves to fish in the navigable waters in front of said sites under grants from the states of Washington and Oregon.

Complainant based its alleged right to the exclusive fishery upon the government ownership of the premises and of the lease thereof from the Secretary of War. And to sustain its contention requires a construction of the President's proclamation and a definition of the powers of the Secretary of War under said Act of Congress, as well as a determination of the question of fact whether or not the alleged obstructions were placed in the waters in violation of the Constitution and laws of the United States prohibiting the obstruction of navigable waters.

This case is very much like the case of *N. P. Ry. Co. v. Soderberg*, 188 U. S. 526 (47 L. Ed. 575), wherein Mr. Justice Brown, delivering the opinion of the court, said:

> "But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of juris-

diction, but as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship under that clause of Sec. 1 of the Act of 1888 (25 Stat. at L., 433, chap. 866) clothing the Circuit Court with jurisdiction of all civil suits involving over $2,000, 'and arising under the Constitution or laws of the United States.' If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States."

The case of *Wilson Cypress Co. v. Enrique Del Pozo y Marcus*, 236 U. S. 635 (59 L. Ed. 758), is also controlling upon the question under consideration. In that case Mr. Justice McKenna, in delivering the opinion of the court, said:

"A motion is made to dismiss the appeal on the ground that the jurisdiction of the court was invoked solely because the complainants were aliens and the defendant was a citizen of the United States. This is a narrow view of the bill. It seeks to quiet the title of complainants to a tract of land commencing in a grant from Spain, depending for its completeness upon the treaty with Spain and laws of the United States, and the action under those laws by the officers of the Land Department of the United States, and it especially relies on those laws to defeat defendant's claim of title, and to have it removed as a cloud upon that asserted by complainants. Indeed, there is scarcely a contention of complainants which does not primarily or ultimately depend upon

the laws of the United States. The motion to dismiss is therefore denied."

The case of *Doolan v. Carr,* 125 U. S. (31 L. Ed. 844), is another case which we deem to be a precedent upon the question being discussed. In that case Mr. Justice Miller, delivering the opinion of the court, said:

> "No citizenship of either party is alleged, and this is urged as a ground of reversal in this court, to which the case has been brought by a writ of error. It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States, within the meaning of the Act of March 3, 1875, 18 U. S. Stat. at L., 470."

The case of *Cummings v. Chicago,* 188 U. S. 410 (47 L. Ed. 525), is also in point. Mr. Justice Harlan, in delivering the opinion of the court, said:

> "We hold that the Circuit Court had jurisdiction in this case. That the parties, plaintiffs and defendant, are citizens of the same state is not sufficient to defeat the jurisdiction; for by the Act of March 3, 1887, chap 373, as corrected by the Act of August 13, 1888, chap. 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the Constitution or laws of the United States: 24 Stat. at L., 552; 25 Stat. at L., 433 (U. S. Comp., Stat 1901, p. 508). The present suit does arise under the Constitution and laws of

the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so called) of the Secretary of War, which legislative enactments and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a federal right were necessary in order to set forth the plaintiffs' cause of action."

Jurisdiction of the Trial Court Was Attacked.

After the issues had been made up and before the trial of said suit, the jurisdiction of the trial court was attacked by complainant by filing a motion to dismiss the suit upon the ground that the *situs* of the property involved was in the State of Oregon, and therefore not within the jurisdiction of the trial court. This motion was denied by the trial court, thereby sustaining its jurisdiction, but upon appeal to the Circuit Court of Appeals, the question was presented anew, with the result that the Circuit Court of Appeals denied the jurisdiction of the trial court and remanded the suit, with direction to dismiss the complaint.

The case is therefore one in which an appeal could have been taken to this court directly from the decree of the trial court and the question of

jurisdiction passed upon by this court. Appellees elected to appeal to the Circuit Court of Appeals, but that does not defeat appellants' right to have the jurisdictional question determined by this court.

II.

The Circuit Court of the United States for the Western District of Washington Had Jurisdiction Concurrent With the Courts of Oregon on the Columbia River and in This Suit.

The Act of Congress by which the Territory of Washington was carved out of the Territory of Oregon provided for concurrent jurisdiction on the Columbia River where it forms the boundary between said territories as follows:

> "The Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River where said river forms a common boundary between said territories."
> 10 Stat. at L., 172.

The Act of Congress by which the State of Oregon was admitted into the Union contained the following provision for concurrent jurisdiction on the Columbia and Snake rivers, where they form the boundary of said state:

> "Including jurisdiction in civil and criminal cases upon the Columbia River and Snake River concurrently with the states and territories of which those rivers form a boundary in common with said state."

"(2) The State of Oregon shall have concurrent jurisdiction upon the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

11 Stat. at L., 383.

The quotation from Section 2 of the act last above mentioned is the same clause which is contained in the acts admitting the states bordering upon the Mississippi River and its tributaries into the Union. It is undoubtedly a grant of jurisdiction not only to the courts, but to the legislative and executive departments as well. This court in a decision rendered in 1909 recognized the concurrent jurisdiction of the courts of Oregon and Washington on the Columbia River, and said in part as follows:

"By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those states is given concurrent jurisdiction upon the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either state, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to civil and criminal cases, but in the second section of that act there was given in general terms concurrent jurisdiction."

Nielsen v. Oregon, 212 U. S. 315; 53 L. Ed. 528.

The Federal Court of the District of Oregon has recognized the concurrent jurisdiction of the states of Oregon and Washington on the Columbia River as follows:

> "When, in 1853, the Territory of Washington was created out of the Oregon territory, Congress established concurrent jurisdiction between the two territories on the Columbia River over all offenses committed on such river. Upon the admission of Oregon into the Union this jurisdiction was confirmed and made to include matters of a civil nature. The solemnity of a compact was given to this boundary and jurisdiction by the act admitting Oregon into the Union, which could not be abrogated nor altered by the subsequent admission of Washington. It secured to the new State of Oregon, as well as the future State of Washington, such equality of right as existed between all the states separated by navigable rivers, and as was necessary to the effective enforcement of the laws of each."
>
> *In re Mattson*, 69 Fed. 535.

The Supreme Court of the State of Oregon also recognized such concurrent jurisdiction in the case of *State v. Nielsen*, 51 Ore. 588; 95 Pac. 720.

The concurrent jurisdiction so granted is *on* the river, and does not include jurisdiction of the bed of the river. The case of *McFall v. Commonwealth, supra*, was a criminal case, in which the defendant was charged with having performed a marriage ceremony while upon a boat on the Ohio River, opposite the shores of Ohio and Kentucky, under authority of a marriage license issued by the State of Ohio,

and the Kentucky court held that the State of Ohio had concurrent jurisdiction with the State of Kentucky on the Ohio River, even though Kentucky owned the bed of the river up to low-water mark on the Ohio side.

In *Carlisle v. State, supra,* an early Indiana case, the defendant was charged with the crime of murder, alleged to have been committed on the Ohio River between the shores of Indiana and Kentucky, and the court there held that the courts of Indiana have concurrent jurisdiction with the courts of Kentucky on the Ohio River for the punishment of crimes committed on the river, even though the State of Kentucky owns the river bed up to the Indiana shore.

The case of *Sherlock v. Alling, supra,* was an action for damages for the wrongful killing of deceased while upon a steamboat on the Ohio River, opposite the Indiana shore, which cause of action was dependent upon a statute of the State of Indiana, and the court there held that the State of Indiana has legislative as well as judicial jurisdiction on the Ohio River, and the Indiana statute was in effect at the place where the killing occurred.

The Supreme Court of Iowa, in discussing the reasons for the grant of concurrent jurisdiction on the Mississippi River to that state, said in part:

> "There is an immense commerce on this great common highway. Water crafts, rafts and boats of almost every kind and description

are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made and obligations assumed for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property by persons while *on the river* for which they should be held answerable, criminally as well as civilly. If jurisdiction in such cases were made to depend upon the inquiry whether the boat or vessel was on one side or the other of the main channel; whether the injury was inflicted or the wrong committed east or west, north or south of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in that respect would prove fatal to the action or prosecution. And hence the reason of making the jurisdiction concurrent in all such cases."

Gilbert v. Moline Water Power Co., 19 Iowa, 319.

In a later case the same court said:

"In other words, does the fact that the boat, at the time of the indictment and trial, was on the east side of the main channel of the river, resting temporarily in the rear of the island, because the water had receded from it, or for repairs, take it out of the jurisdiction of this state? It seems to us clearly that it does not. In the eye of the law, a crime committed on the boat under the circumstances stated is as much an offense perpetrated *on the river* as though the vessel were at the time afloat. If it is not so, it follows that if a vessel navigating the Mississippi River should run aground east of the middle of the main channel and the water should recede, leaving it upon the ground tem-

porarily, the State of Iowa would have no jurisdiction over a crime committed upon it under such circumstances, and hence would arise the question so difficult of determination and which it was the purpose of the Act of Congress above cited to avoid, whether the act was committed one foot east or one foot west of the *medium filum aquae.*"

State v. Mullen, 35 Iowa, 199.

In *State v. Metcalf, supra,* the Supreme Court of Missouri, in passing upon a case in which the defendant was charged with maintaining a gambling house on a boat on the Missouri River, opposite the Missouri shore, the court followed and approved the reasoning used in the two Iowa cases just mentioned.

In *Memphis C. & P. Co. v. Pikey, supra,* the court said:

"It has been uniformly held by this court that this state possesses jurisdiction for the enforcement of the civil and criminal laws of the state on the Ohio River, where it constitutes the southern boundary of the state. . . . It is clear from the authorities cited that this state had concurrent jurisdiction over the Ohio River at the points where it is alleged the death of appellee's intestate was caused by the wrongful acts of appellants. The only difference is that over the territory within the boundaries of the state the jurisdiction is exclusive, while on the Ohio River it is concurrent with Kentucky. It necessarily follows that the law which governs this case, including the service of summons and return, is the same as if the Ohio River was wholly within the State of Indiana

where it forms the southern boundary of the state."

Memphis C. & P. Co. v. Pikey (Ind.), 40 N. E. 527.

In *Opsahl v. Judd, supra*, the plaintiff sought to recover damages for the death of deceased while on a steamboat on the St. Croix River, opposite the shore of Minnesota and on the Wisconsin side of the channel, and the court upheld plaintiff's right to recover, on the ground that the State of Minnesota has concurrent jurisdiction with the State of Wisconsin on said river.

In *Roberts v. Fullerton, supra*, the court said:

"Having reached the conclusion that the laws of Minnesota do not, for any purpose, extend over the territory on the Wisconsin side of the main channel of the Mississippi River, except as regards things on the river—things of a floatable nature,—we are now to inquire whether by reason of respondent's net being retained in place by means of stakes driven in the bed of the lake, it partook of the nature of a permanent object in the river rather than of a floatable object or thing on the river. Counsel for respondent *ex industria* added an allegation to the complaint, stating the fact that the net was fastened to the bed of the lake by stakes. We do not deem that circumstance material. The net was no more an object of a permanent nature and part of the land, so to speak, to which it was attached, than a boat anchored in a stream temporarily. It was located where found for a purely temporary purpose. It was *not* put in place by acts on the water. The dividing line of jurisdiction as to physical ob-

jects is between those on the river and those forming a part not of the river, strictly speaking, but of the river bed."

Roberts v. Fullerton (Wis.), 93 N. W. 1111.

In the case of *State v. Moyers, supra,* the defendant was charged, in an Iowa court, with having unlawfully operated a hoop-net in the Mississippi River, near the Illinois shore, and the court said in part as follows:

> "The whole question seems to turn ultimately on the meaning to be given to the phrase 'concurrent jurisdiction.' If the purpose of Congress was to give to each of the states bordering on the river no other power than to enforce its laws with reference to transactions on that part of the river included within its boundary line, then no purpose whatever was served beyond that which would have been accomplished by fixing the boundary line itself, for complete jurisdiction up to that boundary line would thereby have been vested in the adjoining states. Certainly something more was intended, and the thing evidently intended was that all the jurisdiction which might otherwise have been exercised by the state with reference to transactions on the river within the boundary line should be possessed and exercised by the state with reference to like transactions on any part of the river, without regard to the boundary. This conclusion is in accordance with the great preponderance of authority in relation to similar questions."
>
> *State v. Moyers,* 136 N. W. 896.

The cases above referred to are not in conflict with the bridge and dam cases, but a comparison of the reasoning employed by the courts will show a

uniformity of decision and a division of the cases into two classes, namely, those dealing with floatable objects on the river and those dealing with permanent objects built upon the bed of the river.

Congress granted concurrent jurisdiction on the large navigable rivers of the United States to the states on either side of the river, where such river forms a part of their boundaries, at the same time fixing the state boundaries at the middle of the main channel of such rivers. The middle of the main channel of such rivers is not marked by any visible monument upon the surface of the water. Floatable objects moving upon the surface of the water cross and recross this state line. Rights are acquired and liabilities incurred while on such rivers, without respect to the boundary lines of the states, and were it not for the grant of concurrent jurisdiction, the question so difficult of proof would arise in every such case, namely, on which side of the state line did the right accrue, or was the liability incurred? It was undoubtedly the intention of Congress in granting such concurrent jurisdiction that acts on the river should be within the jurisdiction of either state. Congress undoubtedly intended also that objects of a fixed and permanent nature, which are affixed to or are a part of the bed of such river, should not be subject to such grant of concurrent jurisdiction. Such objects are either a part of the real estate, or their location is fixed

and permanent so that no question can arise in regard to which state they are located in. There is no need for concurrent jurisdiction over such fixed objects, for the reason that they are always in the same place, and so it is that objects which float upon the water, or which move about in the water, and which rest in part on the bed of the stream and in part upon the water, and all rights and liabilities in connection therewith, are within the grant of concurrent jurisdiction, while the bed of the river, together with all permanent structures built upon or into it, are not subject to such concurrent jurisdiction.

With this rule in mind, let us examine the case at bar. The obstruction complained of in this case is properly termed a set net, and consists of net and anchors, the lower edge of which is held to the bed of the river by leads fastened to the edge of the net, and the upper edge is made to float on the surface of the water by corks or pieces of wood attached. Each end of the net is fastened to an anchor, as required by law. The anchor is a large stone, with a cable about 25 feet long made fast to it, and on the other end of the cable is a float or buoy. The net sets in the water, and as the fish move about they put their heads through the meshes in the net and are caught by the gills. The net must be taken out of the water to take the fish out of it.

We submit that such a net is a floatable object on the river and within the concurrent jurisdiction

of the states bordering upon such river. It is not a part of the river bed, neither is it built into or upon the river bed; on the contrary, it is borne up by the water and is held in place by anchors, which serve the same purposes and in every respect are similar to the anchor of a boat. If the states bordering on the river have concurrent jurisdiction on a boat anchored to the bed of the river, they certainly have such jurisdiction over a net anchored to the bed of the river. The boat may lift its anchor and move about, crossing and re-crossing the state line. So will the fisherman with his net. When he takes up the net to take out the fish, he may be able to and he may choose to place it back on the same spot, or he may go a few feet to either side. or to a distant part of the river, and so his net is a floatable, movable object on the river. His net is a chattel, and if put down upon the land of a private individual would not become a part of such land, and is not a part of the bed of the stream while in use, but is a floatable object, peculiarly within the reasoning used by the courts in announcing the reason for a grant of concurrent jurisdiction.

When we analyze the laws of the states of Washington and Oregon relative to the fishing industry we find both states appropriating large sums of money for building and maintaining fish hatcheries for the propagation of young salmon fish, they forbid the taking of fish from spawning grounds, forbid the taking of salmon during certain periods of

each year, and regulate the kind and manner of using all fishing devices in the Columbia River, and all of this is done for the single purpose of preserving the fishing industry on the river. The efforts of the states have been rewarded to an extent that now thousands of the citizens of each state find employment and sustenance in the fishing industry on this river, besides the product which is preserved by canning and goes out to the world has a value of many millions of dollars each year. The fisherman, before going out upon the river with his rod and line or his net, must provide himself with a license from the state. In the enforcement of these laws, must the fish warden, at his peril, prove that the fisherman was, at the time, east or west, north or south, of this invisible state line, and must the fisherman keep well away from it so that he may not violate the law of the sister state? We think not. We think the regulation of the fishing industry is peculiarly within the grant of concurrent jurisdiction.

III.

THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON HAS JURISDICTION OF THIS SUIT, BY REASON OF ITS JURISDICTION OVER THE PARTIES, REGARDLESS OF THE SITUS OF THE PROPERTY.

It is a fundamental principle of equity that equity acts *in personam*, and in this suit the appellants were residents within the territorial jurisdiction of the court. The appellee voluntarily came into that jurisdiction and instituted this suit, asking for injunctive relief against appellants.

This court, in the case of *Massie v. Watts, supra,* speaking through Chief Justice Marshall, said:

> "Upon the authority of these cases and of others, which are to be found in the books, as well as upon general principles, this court is of opinion that in the case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

In the case of *Muller v. Dows, supra,* this court upheld the power of a court of chancery to decree the sale upon foreclosure proceedings of property, a part of which was outside the territorial jurisdiction of said court.

In *Phelps v. McDonald, supra,* this court said in part:

> "Where the necessary parties are before a

court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond its territorial jurisdiction. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*."

Phelps v. McDonald, 25 L. Ed. 476.

In *Cole v. Cunningham, supra*, this court affirmed a decision of the court of last resort of Massachusetts in a case in which citizens of Massachusetts were enjoined from prosecuting an attachment proceeding in the State of New York.

In the case of *Philadelphia Co. v. Stimson, supra*, the court, in reviewing a decision of the courts of the District of Columbia in a suit in which an injunction was asked against the Secretary of War, preventing him from interfering with improvements in the river in Pennsylvania, the court said in part:

"The defendant is within the district, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether he should be restrained from continuing his opposition to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the

defendant and may compel obedience to its decree."

Philadelphia Co. v. Stimson, 56 L. Ed. 578.

United States Circuit Court of Appeals, Sixth Circuit, in a decision rendered in 1913, said in part:

> "The general rule is well established that where the necessary parties are before a court of equity, it is immaterial that the subject-matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel the defendant to do all things necessary, which he could do voluntarily, to give full effect to the decree against him. Courts in such cases consider the equities between the parties, and make decrees *in personam*, according to such equities, enforcing obedience to their decree by means of process against the person."
>
> *Louisville & N. R. Co. v. Western U. Tel. Co.,* 207 Fed. 6.

In the case of *Schmaltz v. N. Y. Mfg. Co., supra,* a court of Pennsylvania restrained persons within its jurisdiction from removing a refrigerating plant from a brewery in the State of New York. In that case the court reviewed many decisions of the courts of last resort and of this court, and said in part:

> "While the *situs* of the property in dispute is in another state, and a decree of a court of this state cannot operate upon or directly affect it, yet we think that a court of equity in this state having jurisdiction of all the parties, can determine their rights to the property, and by proper process enforce them *in personam.*"
>
> *Schmaltz v. N. Y. Mfg. Co.,* 204 Pa. 1; 53 Atl. 948.

In the case of *Jennings v. Beal, supra,* the court of Allegheny County, Pennsylvania, was asked to enjoin a trespass upon real estate in an adjoining county and outside the territorial jurisdiction of the court, and the Supreme Court of Pennsylvania in affirming the decision said in part:

> "The sixth and eighth specifications raise the objection that the court is without jurisdiction because the land, as to which protection is sought, is wholly in Armstrong County, beyond the territorial jurisdiction of the court. The bill was served personally on the defendant in Allegheny County, and, so far as the record shows, he may be a resident of this county. The decree asked is personal. When the court has jurisdiction of the person, it may issue an injunction to prevent trespass upon lands in another county."
>
> *Jennings Bros. & Co. v. Beale,* 27 Atl. 948.

In *Steele v. Bryant, supra,* the Supreme Court of Kentucky said in part:

> "Among other things, the plaintiffs offered in evidence a deed made to Mrs. Bryant by Chamberlain, as trustee, in pursuance of a judgment of the Circuit Court of Illinois, where the parties then lived, and the record of that proceeding was also read in connection with the deed. This deed was properly admitted in evidence; for, while the courts of Illinois cannot affect by their judgments the title to land in Kentucky, still when all the parties in interest are before the court there, the court may settle their rights, and a deed made by one of the parties pursuant to the judgment of the court passes the title."
>
> *Steele v. Bryant,* 116 S. W. 757.

In *Allen v. Buchanan, supra,* the courts of Alabama restrained the defendant from further prosecuting an action by attachment and garnishment in the State of Louisiana. .

In the case at bar it is not alleged that appellants trespassed upon the land leased by appellee, but upon its right to fish in the waters in front of said premises. The right to fish in such waters is not a part of, or appurtenant to, the land upon the shore, but is a personal right of citizenship, and follows the person, and necessarily an action to protect such right is transitory and follows the person. The title or right of possession of the island is not put in issue, neither is there a demand that process be served or executed outside the jurisdiction of the court; but, on the other hand, the decree in this action can be enforced like all other decrees *in personam* are enforced, namely, by process against the person. The case is peculiarly within the reasoning used by this court in *Philadelphia Co. v. Stimson, supra.*

Furthermore, appellee selected the jurisdiction within which to bring this suit and filed its complaint therein, alleging that Sand Island is situated within the State of Washington and within the territorial jurisdiction of the trial court and asked for relief by way of injunction, which was granted upon the filing of its complaint and injunction bond, and these appellants believing that Sand Island and the waters adjacent thereto were

situated within the State of Washington and within the jurisdiction of the trial court, made answer to plaintiff's complaint and filed its cross bill, seeking affirmative relief in that court. By virtue of the injunction order these appellants' set nets were hauled up out of the water by the servants and agents of appellee and the servants and agents of appellee by reason of and under the protection of the injunction order, fished the waters in front of Sites Nos. Two and Three on Sand Island from low water mark out to and beyond the government harbor line with their seines, approximately 2,500 feet in length, and caught many valuable fish therein, which otherwise would have been caught by appellants in their set nets, and appellee continued to enjoy this prerogative for the period of a year after the temporary injunction was granted, during approximately eight months of which time the officers of appellee knew that the Supreme Court of the United States had decided that Sand Island and the waters adjacent thereto were within the territorial jurisdiction of Oregon. It appears in the record in this case that long prior to the time that this suit was filed and prior to the time that appellee leased Sites Nos. Two and Three on Sand Island from the government, that these appellants purchased the right to fish in the waters in front of said sites from persons having possession thereof and claiming to own the right to fish therein by reason of purchase and long and con-

tinued use and that these appellants after the purchase of said fishing rights, continuously fished in the waters in front of Sites Two and Three on Sand Island, during the fishing season of each year to and including the year 1907, and that in the year 1908 and before this suit was instituted, these appellants secured licenses for the operation of set nets in the waters in front of Sites Nos. Two and Three on Sand Island, for the then current year of 1908, and located and marked said fishing place in all respects according to the laws of the State of Washington and that these appellants secured licenses from the State of Washington and that these appellants secured licenses from the State of Oregon for the operation of their set nets in front of Sites Nos. Two and Three on Sand Island, and duly located and marked that fishing place in the manner provided by the laws of the State of Oregon, all of which was had and done in the year 1908 and prior to the time that appellee secured its seine licenses from the State of Washington and appellee did not in fact secure any license whatever from the State of Oregon for that year and long prior to the time that this suit was instituted and the injunction granted.

After the fishing season for the year 1908 was over and after appellee had enjoyed the privilege of fishing in front of said sites and had caught many valuable fish under and by virtue of the injunction order theretofore granted by the trial court,

appellee presented its petition to the trial court, alleging that it did not have jurisdiction of the matter and that it ought, therefore, to dismiss the suit, thereby allowing appellee to enjoy all the benefits of having fished in said waters and without recourse to appellants on account of the alleged wrongful issuance of the injunction, by which it had been protected in fishing as aforesaid. These appellants believing that the trial court did have jurisdiction because of its concurrent jurisdiction on the river and because of its having secured jurisdiction over the person involved, opposed appellee's motion to dismiss, which motion was thereupon denied by the trial court and upon a final hearing of the matter, it was determined that the relief prayed for by appellee should be denied and that the injunction theretofore issued in the suit had been wrongfully issued, and the court submitted the matter to a master to assess the damages accruing to these appellants, which was accordingly done and thereafter the court entered a judgment against appellee in the sum of $22,083.00, together with the costs and disbursements of the suit. Thereupon appellee, Columbia River Packers' Association, appealed to the Circuit Court of Appeals for the Ninth Circuit, which court did not pass upon the merits of the suit, but decided against the jurisdiction of the trial court and decreed that the suit should be dismissed, thereby leaving these appellants in the position of having been damaged in the

sum of $22,083.00 by the wrongful issuance of an injunction but without any relief whatsoever.

In view of those facts, a denial of the jurisdiction of the trial court amounts to a taking of the property and rights of these appellants by the hand of the court, whose authority we respect and to whom we look for justice, and turning them over to appellee, to the appellants' great damage, without due process and without recourse. It is fundamental that no court which takes the property and rights of one party and places them in the hands of another, without giving those parties a hearing on the merits, can function in a spirit of justice.

IV.

The Appellee, Columbia River Packers' Association, Did Not Acquire Any Fishing Rights in the Waters of the Columbia River Below Extreme Low Tide Line in Front of Sites Nos. Two and Three, By the Act of Congress Approved July 23, 1892 (27 Stat. at L., 321), and the Lease of a Part of the Island (Plaintiff's Exhibit "E", Trans., p. 717) Executed By the Secretary of War.

Prior to the admission of Oregon into the Union, the United States owned the bed of the Columbia River as well as the water and fish in it, so far as the same is capable of ownership, and when Ore-

gon was admitted into the Union, such ownership passed to the new state, subject to the rights of the United States over navigation and the concurrent jurisdiction of Washington on the river, in trust, however, for the use and benefit of its citizens.

> "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people and the ownership is that of the people in their united sovereignty."
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> *McCready v. Virginia,* 4 Otto, 391; 24 L. Ed. 248.
>
> See also: *Smith v. Maryland,* 18 How. 71; 15 L. Ed. 269.
>
> "By virtue of its sovereignty, the state, upon its admission into the Union, became vested with the title to all the shores of the sea and the arms of the sea, covered and uncovered by the ebb and flow of the tide, usually called tide lands, as well as of the land under all the navigable waters within the state; subject, however, to the public right of navigation and the common right of the citizen of the state to fish therein."
>
> *Hume v. Rogue River Packing Co.,* 51 Ore. 237; 92 Pac. 1065.

Sand Island is a part of the public domain and because of the proclamation of the president, is a military reservation and is under the control of the Secretary of War. The right to dispose of the public domain is vested in Congress, and any grant

thereof by the Secretary of War must be authorized by an Act of Congress. In this case, therefore, the Act of Congress and the lease executed under the direction of the Secretary of War must be construed together as one grant. The Act of Congress provides:

> "That authority be and is hereby given to the Secretary of War . . . to lease . . . such property of the United States under his control."
> 27 Stat. at L., 321.

The granting words of the lease are:

> "Does hereby let and lease the parcel of land on Sand Island and shown on the attached maps as sites Nos. Two and Three. To have and to hold the said premises, with all the rights, easements and appurtenances thereunto belonging."
> Plaintiff's Exhibit "E"; Trans., p. 717.

There is no express mention of fishing rights in either the Act of Congress or the lease, the former referring only to "property of the United States" and the latter referring only to Sites Nos. Two and Three on Sand Island and bounded by "low tide line."

Your attention is called to the fact that said appellee alleges in its complaint that said premises were leased to appellee by the United States for the sole purpose of being used as a fishery, and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores, and

that said appellee does not claim any trespass upon its rights to the shore, but claims that we are trespassing upon its right to fish in the waters in front of said shore. The rule of construction applicable to grants from the government to a private individual is as follows:

> "All rights of the Crown are to be strictly construed against the grantee contrary to the usual policy of the law in the consideration of grants; and upon this just ground that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away."
>
> *Shively v. Bowlby,* 152 U. S. 1; 38 L. Ed. 331.

> "In those states, where it has been conceded that such grant may be made by the state, it has been universally held that, the claim being in derogation of a public right, such grants are strictly construed against the grantee, and an intention to part with any portion of such public right will not be presumed unless clear and special words are used to denote it. 'A grant of an exclusive right of fishery in a public water is in derogation of common right, and must be expressly mentioned to vest in the grantee. No such right will pass by implication.' 2 Farnham, Waters, Sec. 1379. No language being found in plaintiff's deeds from the state which by unavoidable construction imports an intention to grant an exclusive right to fish for salmon in the water opposite and adjacent thereto, it follows that he does

not have that right by virtue of his tide land deeds."

Hume v. Rogue River Packing Co., 51 Ore. 248.

In the first instance, then, the United States could not grant rights of fishery in the waters in question to appellee, for the reason that it does not own or have control of such fishing rights. The state owns them and they are under the control and regulation of the state. Secondly, if it be conceded that the government owns some fishing right in said waters, then it clearly did not grant any such right to appellee in this case. An exclusive right of fishery is certainly in derogation of the common right of fishery and the rule of construction above quoted is peculiarly applicable to this case. It may be admitted that the sites on Sand Island are not deemed valuable for any purpose by appellee, except as a fishing place, and for the purpose of this argument it may be admitted that the officers of the United States intended to lease said sites for the purpose of use as a fishery, nevertheless, their intentions cannot defeat the rights of these appellants and deprive them of their property.

V.

The Right to Fish in the Navigable Waters of the Columbia River Is a Common Public Right of Property and of Citizenship of the Citizens of the States of Oregon and Washington, and Is Subject to Regulation and Control by Said States.

This court considered the question under discussion here in the case of *McCready v. Virginia*, wherein Chief Justice Waite delivered the opinion of the court and said in part:

> "The principle has long been settled in this court, that each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty: *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters, and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property.

> The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." *McCready v. Virginia*, 24 L. Ed. 248.

In its decision of the above entitled case, this court followed the reasoning used by Chief Justice Taney in *Martin v. Waddell, supra,* a case which arose in the State of New Jersey and involved oyster fisheries.

The case of *Shively v. Bowlby,* 152 U. S. 1 (38 L. Ed. 331), was an action involving tide lands on the Columbia River near the *situs* of the present action and this court in that case quoted from and approved the decision of this court in *McCready v. Virginia, supra.*

A leading case in the State of Oregon upon this subject is *Hume v. Rogue River Packing Co.,* 51 Ore. 237 (92 Pac. 1065), and the court in that case cited with approval the case of *McCready v. Virginia, supra,* as follows:

> "The business of fishing is unquestionably lawful and uninjurious, and its exercise in navigable waters is not only a matter of common and public right, but is the right of a citizenship and property combined."

That case has never been departed from by any later decision in the State of Oregon and is the rule of law applicable at the present time.

The leading case in California is *Pacific Steam Whaling Co. v. Alaska Packers' Assn.,* 138 Cal. 631

(72 Pac. 161), and the court in that case said in part:

> "The right of fishery in the waters of the ocean, whether in the open sea or where the waters ebb and flow over tide lands, is a public right which may be exercised by any citizen."

In Michigan the leading case is *Lincoln v. Davis,* 53 Mich. 375 (19 N. W. 103), and was a case involving the right to fish with a net staked to the bottom of Thunder Bay, an arm of Lake Huron, and the court in that case said:

> "I think that the waters of Thunder Bay are public waters and the right of fishing therein is a common right of all the citizens of the state, subject only to the paramount right of navigation, and is the subject of legislative control."

The law announced in that case seems never to have been departed from, but has been followed and approved by that court in two later cases: *Ainsworth v. M. H. & F. Club,* 153 Mich. 186; 116 N. W. 992, and *Stewart v. Greanyea,* 154 Mich. 132; 117 N. W. 655.

The leading case in Wisconsin is *Willow River Club v. Wade,* 100 Wis. 86; 76 N. W. 273. In that case the club was the owner of a large tract of land on either side of Willow River and used the land as a fishing and hunting ground and denied admission to every one, except its members. Wade, who was not a member, went up Willow River in a boat and fished from his boat opposite the shores owned by the club, and in an action to enjoin the alleged

trespass, the court held that Willow River was public navigable water and that Wade, in common with all other citizens, had a right to go upon it and fish. That case was followed and approved in *Roberts v. Fullerton, supra,* and *Diana Club v. Husting, supra.*

The same rule has been followed by the courts of Ohio and in *Bodi v. Club,* 57 Ohio St. 226, 48 N. E. 944, the court said:

> "That the rights of navigation and fishing go together in the lakes and navigable bays of this state, has been held by this court and seems settled. *Sloan v. Biemiller,* 34 Ohio St. 492. The navigable waters in dispute in this case form a part of a public bay and not parts of the Sandusky River and Mud Creek; and the Circuit Court erred in holding otherwise upon the facts as found in the record. Being part of an open bay, the public has the rights of navigation and fishing in its navigable waters."
>
> *Bodi v. Club,* 57 Ohio St. 226; 48 N. E. 944.

The Supreme Court of New Hampshire in a case decided in 1890 involving the public rights of fishery in boatable streams and large ponds, held that the common law, as applied in England, is in force and effect in that state, and, therefore, the public has a common right of fishery in the boatable streams and large ponds.

> See *Concord Co. v. Robertson,* 66 N. H. 1; 25 Atl. 718.

The Supreme Court of Virginia in a case decided in 1906 followed the rule above mentioned.

In that case Cape Henry Syndicate and its grantors owned the land to low water mark and had for a period of fifty years exercised the exclusive privilege of hauling seines in front and landing upon the shore. The defendant, Whitehead, procured a set net license from the state and anchored his set nets in front of such land by driving piling into the bed of the ocean, and in an action brought by the syndicate for the removal of the net as a nuisance, it was held that the ownership of the shore did not carry with it the exclusive right to fish in the adjacent waters, but on the contrary the public has a common right to fish in said waters.

Whitehead v. Cape Henry Syndicate, 105 Va. 463; 54 S. E. 306.

It is, therefore, not only the settled rule of this court, but of many of the state courts as well, that the right to fish in the navigable waters of the United States is a public and common right of property and of citizenship, and is subject to control by the states within whose jurisdiction such waters lie.

VI.

THE RIGHT OF ACCESS FROM THE SHORE TO NAVIGABLE WATER IS SUBJECT TO THE PUBLIC RIGHTS OF NAVIGATION AND FISHERY, AND THE SHORE OWNER WILL BE HELD TO A REASONABLE EXERCISE OF HIS RIGHTS OF ACCESS WHERE THE SAME INTERFERE WITH THE PUBLIC RIGHTS OF FISHERY.

Since the decision of this court in *Yates v. Milwaukie, supra,* there can be no question that the owner of the shore has a right of access to the water in front of his premises, subject, however, to the rights of the public which include navigation and fishery. Since the decision of this court in *Greenleaf-Johnson v. Garrison, supra,* there can be no question that such right of access, including the right to wharf out, is subordinate and inferior to the public right of navigation and to the right of Congress to improve the water way in aid of navigation. The riparian right to the flow of a stream for power purposes, is, also, subordinate to the right of navigation.

See *United States v. Chandler-Dunbar W. P. Co., supra.*

In *Atlee v. N. W. Packet Co., supra,* Mr. Atlee was held to be liable in damages for injury to a boat being operated by the Packet Company, which injury was caused by striking against piling placed in the river by Mr. Atlee, opposite his riparian lands, and used by him in the storage of logs for his private use. It is settled, therefore, that the

right of access of a riparian owner, including the right to wharf out in aid of navigation, must give way to the superior public right of navigation.

The extent or limitations upon the right of access to adjacent waters, have not been clearly defined by any of the courts in the United States, but in *Hedges v. West Shore Railway Co., supra,* Mr. Hedges was the owner of the shore and conducted a manufacturing plant upon his property, where he manufactured brick and tile and shipped the product of his manufacture upon barges. The railway company, by license from the State of New York, built a railway upon the tide lands in front of said premises, which entirely cut off the rights of access to the water, except an opening fourteen feet wide and eight feet high, and in that case it was held that such was not an unreasonable interference with the plaintiff's right of access and the railroad was not, therefore, liable to be abated or to respond in damages.

In *Oelsner v. Nassua Light & Power Co., supra,* the plaintiff owned the shore and the defendant built its power line, consisting of poles 100 feet apart, and bearing copper cables, along on the tide lands in front of plaintiff's shore, and in that case the court held that, inasmuch as the plaintiff was unable to show any damage, that he could not recover.

In *Ferry P. I. & S. Assn. v. White River I. & S. Assn., supra,* each of the parties to the suit was

engaged in running logs down the river and in collecting such logs into booms and rafts, to be towed, and plaintiff being the owner of the shore, claimed the exclusive right to boom logs upon the water in front thereof, and in that case the court held that the right of access to the river from plaintiff's riparian lands could not be entirely and permanently cut off, but neither party had the exclusive right to use the water for storing logs, and their rights in that respect being equal, each must respect the rights of the other.

In *Allen v. Allen, supra,* the defendant in digging oysters, destroyed the rushes growing in the water upon which plaintiff's land abutted, and plaintiff brought an action in damages therefor. In that case the court held that the right to gather rushes from the adjacent water is a riparian right appurtenant to the shore, but that such right is subordinate and inferior to the public right to fish in such waters, and, therefore, plaintiff cannot recover.

In the case of *Barron v. Alexander,* 4 Alaska 591, the plaintiff surveyed a tract of land on Admiralty Island, abutting upon Chatham Strait, in Alaska, and had complied with the law entitling him to a patent therefor. The defendant drove a fish trap, consisting of piling, driven in a straight line and at right angles to the shore, upon which a web was made fast, in the open navigable waters of said strait, and in front of plaintiff's premises.

Plaintiff instituted a suit in the U. S. District Court of Alaska, to enjoin the maintenance and use of such trap for the reason that the trap entirely cut off plaintiff's right of access to the navigable waters in front of its premises. The court found that plaintiff had no wharf or other improvements upon its premises and that the trap did not materially interfere with access from and to said premises. The court discussed and analyzed many cases and decided that fishing in the open navigable waters of Chatham Strait in the manner in which defendant fished was lawful and was the exercise of a long recognized right, that it is lawful for plaintiff to come and go over such navigable water and plaintiff has a right of ingress and egress to and from his premises, and therefore, each of the parties will be held to a reasonable exercise of his right, and neither will be allowed to arbitrarily cut off the right of the other. The court in its opinion referred to its previous discussion in *Hampton v. Columbia Canning Co.*, 3 Alaska 100, in which the court said:

> "While the ownership of the abutting upland carries with it the right of access to deep water and the consequent rights to wharf out, it in no manner gives the owner or holder the right of fishery in tidal waters."

The *Barron* case was appealed to the United States Circuit Court of Appeals for the Ninth Circuit, where it was affirmed without comment upon the question of law involved.

See *Barron v. Alexander*, 206 Fed. 272.

Whatever then be the extent of or limitation upon the right of access, the weight of authority clearly is that an abutting property owner is held to a reasonable exercise of his right of access where it conflicts with a public right, and such weight of authority is based upon reason and justice. If the public right of fishery must give way to the private right of access, it is thereby destroyed, for there can be no fishing in any river without fishing in front of some owner's premises, and the control of the right of fishery will be at once taken from the state and placed in the riparian owner.

In the case at bar, appellee claims the right to go from all points upon its water front to the navigable channel of the river at all times, with a seine approximately 2500 feet long, and by reason of such right to come and go, is entitled to the exclusive right to fish in front of said premises, and is entitled to enjoin us from using our lawful right to fish in said water, because, forsooth, it may want to come or go at the identical point where we are fishing, at the identical time that our net is there. In other words, plaintiff asks this court to take away from the people generally the public right and common right of fishery in all navigable waters, which has been enjoyed by all English speaking people from time immemorial, and place it into the hands of the few who own the abutting lands. This riparian right of access, which for so many years and until the decision of this court in

Yates v. Milwaukee was questioned and uncertain, was not understood by Mr. Justice Miller to override and destroy the common right of fishery, but, on the other hand, it is reasonable to assume that when he used the words "though it must be enjoyed in due subjection to the rights of the public" that he had in mind the public right of fishery, as well as the public right of navigation. This common fishery being owned by the people in their sovereign capacity, might properly be a subject for action by the legislative power, but the law-making powers of Oregon and Washington have never granted control to the riparian owner, but on the contrary, have made laws regulating and licensing the right of fishery.

VII.

THE FISHING RIGHTS OF APPELLANTS, BASED UPON GRANTS FROM THE STATES OF WASHINGTON AND OREGON, ARE PRIOR IN TIME AND SUPERIOR IN RIGHT TO THE RIGHTS OF APPELLEE, BASED UPON A GRANT FROM THE STATE OF WASHINGTON ONLY, AND SUBSEQUENT IN TIME TO BOTH GRANTS TO APPELLANTS.

The statutes of the State of Washington provide for the issuance of licenses for the operation of fishing devices, including seines and set nets, in the Columbia River, and provide that it shall be

unlawful to fish without such licenses. Upon application therefor by any person, a license shall be issued by the fish commissioner for fixed and other appliances for catching salmon or other food fishes, as herein provided, which shall entitle the holder to operate said appliances in the waters of this state, wherein such appliances are not prohibited by law.

Locations for drag seines may be made by driving a substantial stake or erecting a permanent monument at each end of the location claim, and posting thereon the number of the license under which said drag seine is operated. Locations for set nets may be made by erecting a permanent monument near or securely anchoring a buoy on the location claimed, upon which shall be posted the number of the license under which such set net is operated: provided, there shall be a lateral passage way of at least 300 feet and an end passage way of at least 30 feet between all set nets. All fishing licenses expire on the first day of March following the date of their issuance. The closed season during which salmon shall not be caught in the Columbia River, except with rod and line, is from the first day of March to the first day of May, and from the 25th day of August to the 10th day of September, and from six o'clock P. M. on Saturday of each week, until six o'clock P. M. on Sunday following.

The statutes of the State of Oregon provide for the issuance of licenses for the operation of fishing devices, including seines and set nets in the Columbia River, and provide that it shall be unlawful to fish without such lisense. Any person desiring to engage in the business of operating a set net or seine, for the purpose of catching fish in any of the waters of this state, or over which the State of Oregon has concurrent jurisdiction, shall make application in writing to the fish warden of this state, specifying, with convenient certainty, the character of the appliance that the applicant desires to obtain a license for, and the location, if for a stationary appliance, and upon payment of a license fee as hereinafter provided, said fish warden shall issue to such applicant a license to operate the character of appliance desired in said application. Any person having obtained a license from the fish warden to operate a set net, shall cause to be placed and maintained on a substantial post or monument erected for that purpose, on the bank of the river or channel, or upon a buoy securely anchored on the location claimed, the number, preceded by an "O" designated by the fish warden at the time of issuing said license, said property to consist of black figures not less than six inches in length, painted on white ground; in addition thereto said person shall cause to be branded on the corks of each end of said set net and upon the cork nearest the center thereof, the numbers designated in said license, said

numbers to consist of figures not less than one inch in length. The closed season during which salmon shall not be caught in the Columbia River, is from March first to May first, from August 25th to September 10th and from six o'clock P. M. on Saturday of each week to six o'clock P. M. on Sunday following.

The statutes of the two states with reference to set nets are very much alike, differing only in this, that the Washington statute does not require the applicant for a license to designate the place where he expects to fish under such license, but requires the licensee, after the issuance of the license, to designate the place by marks upon the ground, while in Oregon, the applicant is required to designate the place where he expects to fish in his application for license and to mark it after the issuance of licenses.

The record in this case shows (Tr. page 259) that application was made by these appellants to the fish commissioner of the State of Washington on the 15th day of April, 1908, and he issued two set net licenses to appellant McGowan, three to appellant Lindstrom and three to appellant Coyle, all of which licenses were dated and issued upon the 15th day of April, 1908. On the 16th day of June, 1908, appellants located all of said set net licenses in the water of the Columbia River below extreme low tide line, in front of Sites Two and Three on Sand Island, by securely anchoring buoys

upon the sites claimed, and by posting the license numbers painted in black letters about seven inches long on light background upon the buoys. There were two buoys to each location and these buoys were located, of course, at the place we intended to occupy for our set nets (see Defendant's Exhibit No. —). The record also shows (Trans. p. 260) that on the 19th day of June, 1908, appellant McGowan made application to the master fish warden of the State of Oregon for four set net licenses to be located in the waters of the Columbia River beyond extreme low-tide line, in front of Sites Nos. Two and Three on Sand Island, and on the same day four such licenses were issued to him by the master fish warden of Oregon, and thereafter locations were made under said license, by posting the numbers thereof on the buoys hereinbefore mentioned.

On the 30th day of June, 1908, appellee, Columbia River Packers' Association, applied to the fish commissioner of the State of Washington for four drag seine licenses, and on the same day, four drag seine licenses were issued to said appellee by said fish commissioner (Plaintiff's Exhibit "F") authorizing said appellee to fish with a drag seine in the waters of the State of Washington, where not prohibited by law, and thereafter said appellee located said license upon Sites Two and Three on Sand Island, by posting the numbers of said licenses upon stakes driven in the upland upon said sites.

The licenses issued to appellants by the State

of Washington and the locations made under said licenses in accordance with the laws of Washington, amounted to a grant from the State of Washington to appellants, who were citizens and residents within said state, of the privilege of fishing in the places designated by them, for the period beginning with the time when the locations were made, and ending on the first day of March following. The grant was not conditional, nor was an attempt made by the State of Washington to revoke it, and the subsequent issuance of licenses to appellee could not be construed as a revocation of the former grant, for the reason that the licenses issued to appellee did not designate the place at which appellee should fish, but were roving licenses and appellee by coming in upon the location previously made by appellants was a trespasser. In addition to the grant from the State of Washington, the appellant McGowan applied for and procured licenses from the State of Oregon covering this identical location and made locations thereunder. This grant from Oregon was prior to the issuance of appellee's Washington licenses. We have, then, a complete grant from the State of Washington and a complete grant from the State of Oregon prior to any grant to appellee, and in accordance with the familiar maxim of equity, "he who is prior in time, is prior in right," our right to the locations in front of Sites Two and Three is prior and superior to any rights of appellee. While appellants

do not base their right to recover upon long continued use or adverse user, it is in the record in this case that appellant, McGowan, bought all the fishing rights in front of Sand Island from the holders thereof, and fished in said waters during the fishing season of each year from 1902 to 1908.

VIII.

THE INJUNCTION ISSUED ON BEHALF OF APPELLEE, COLUMBIA RIVER PACKERS' ASSOCIATION, WAS WRONGFULLY ISSUED AND APPELLANTS ARE ENTITLED TO RECOVER ACTUAL COMPENSATORY DAMAGES FROM APPELLEES, NOT EXCEEDING, HOWEVER, THE AMOUNT OF THE UNDERTAKING AS AGAINST THE SURETY, UNITED STATES FIDELITY AND GUARANTY COMPANY.

When the court had determined that the relief prayed for in appellee's bill of complaint could not be granted, it dissolved the injunction, and ordered the submission of evidence on the question of damage. The evidence was taken before a special master who made findings of fact and conclusions of law, which were approved by the court. It was determined that the long established method by custom among fishermen of determining the rental value of fishing places upon the Columbia River, is that the owner of the fishing places, as rent, shall receive one-third of the gross catch of fish made at that particular fishing place, when the lessee fur-

nishes all the fishing gear. Evidence was submitted tending to prove the number of fish caught upon the sites claimed by these appellants during the time the restraining order was in effect, and the value of such fish. Evidence was also submitted tending to prove what part of the fish caught by appellee in its seines would have been caught by appellants in their set nets, had they been permitted to fish with them. From all of such evidence, it was determined that the rental for the fishing places claimed by appellants, was the sum of $22,083.00, the amount of judgment entered. There was, therefore, no punitive damages awarded.

In a California case assessing damages upon an injunction bond where the defendants had been enjoined from fishing in the waters of Alaska, the court said:

> "With respect to this kind of damage, of course, there cannot be the absolute certainty possible in many plainer cases; but a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar. The waters in question here constituted a special salmon fishery, where those fish were to be found in great abundance, and the proposition that damages evidently suffered by plaintiff from the wrongful act of the defendant by which plaintiff was excluded from exercising the clearly valuable right of fishing in those waters are en-

tirely beyond legal proof, cannot be maintained."

Pacific Steam Whaling Co. v. Alaska P. Assn., 72 Pac. 162.

The evidence in the case at bar as to the measure of damages is not as certain as it might be in a different kind of case. It is always speculative as to how many fish will be caught at any time or place, but it is admitted by all the parties that the fishing places in controversy here are very valuable; that many fish abound in such waters during the fishing season of each year, and there is ample proof that the fish were there during the year in controversy, from the fact that large numbers of fish were caught by appellee. A set net is much used on the Columbia River, and its utility as a fishing device is universally recognized. Therefore, the damages sustained by appellants are not so speculative as to preclude recovery; in fact if the court should determine that appellants are in the position of a forced lessor of these fishing places, then the element of speculation in the assessment of damages is almost wholly removed. There is positive proof of the number of fish caught and their value and that one-third of such value is the reasonable rental for the fishing places. It seems to counsel that the rule adopted by the trial court is the only reasonable rule to be applied in the assessment of damages in this case.

In conclusion we submit

(a) That the jurisdiction in this suit, as disclosed by the bill of complaint, being based upon diverse citizenship and a construction of an Act of Congress and lease by the Secretary of War, is sufficient to sustain this appeal under Section 6 of the Act of Congress approved March 3, 1891.

(b) That the trial court had jurisdiction over the fishing rights involved in this suit by reason of (1) its concurrent jurisdiction on the Columbia River, and (2) its jurisdiction over the persons of the parties.

(c) That Columbia River Packers' Association did not acquire any fishing rights in the Columbia River below low tide line through the Act of Congress and the lease by the Secretary of War.

(d) That the right of access from the shore to the navigable waters adjacent does not preclude the right of fishery in such waters under the circumstances of this case.

(e) That appellants' rights of fishery are superior to the right of Columbia River Packers' Association and appellants are entitled to the damages awarded by the trial court, because of the wrongful issuance of the injunction.

Respectfully submitted,

FRANKLIN T. GRIFFITH,
R. A. LEITER,
HARRISON ALLEN,
Solicitors for Appellants.

FILED
NOV 20 1917
JAMES D. MAHER,
CLERK

No. 78

In the Supreme Court of the United States

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,
Appellants

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a Corporation,
Appellee

BRIEF FOR APPELLEE.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

FRANKLIN T. GRIFFITH,
HARRISON ALLEN,
R. A. LEITER, Portland, Oregon,
Attorneys for Appellants.

C. W. FULTON, Portland, Oregon,
Attorney for Appellee.

Filed this .....day of November, 1917.

.....
Clerk.

Owl Printing Co. Astoria, Oregon.

In the Supreme Court of the United States

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,
Appellants

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a Corporation,
Appellee

No. 78

MOTION TO DISMISS APPEAL

Comes now the above named appellee, by its solicitor C. W. Fulton, and moves the court for an order dismissing the appeal herein, and for grounds of motion, alleges:-

I.

That this court is without jurisdiction to entertain this appeal, in that the jurisdiction of the United States District Court for the Western District of Washington, Southern Division, being the court in which this suit was instituted, was and is dependent entirely upon the opposite parties to this suit being citizens of different states.

II.

That the decree rendered and entered in the United States Circuit Court of Appeals for the Ninth District in this suit, from which the appeal in this suit is being prosecuted, was and is final, from which no appeal can be prosecuted to this court.

C. W. FULTON,
Solicitor for Appellee.

In the Supreme Court of the United States

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,
Appellants

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a Corporation,
Appellee

No.....

To H. S. McGowan, Erick Lindstrom, and J. P. Coyle, the above named appellants, and to Franklin T. Griffith, Harrison Allen, and R. A. Leiter, your solicitors:

You are hereby notified that the foregoing motion to dismiss the appeal in the above entitled cause will be called up for hearing before the above entitled court, at Washington District of Columbia, at the time the appeal in this cause shall be heard

C. W. FULTON,
Solicitor for Appellee.

ARGUMENT ON MOTION TO DISMISS THE APPEAL.

Section 128, of the Judicial Code, provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, etc., "and except as provided in Section two hundred and thirty nine and two hundred and forty, the judgment and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states."

Section 239, of the code, as we understand it, simply empowers the circuit court of appeals, on its own motion or motion of either party to any suit or controversy pending before such court, wherein the judgment or decree of such court is final, to certify to this court for determination such propositions of law, and propositions of law only, which such court desires for its proper decision.

It can not be contended by appellant that the provisions of this section authorizes an appeal to this court, from a judgment or decree of the circuit court of appeals, in any case, which by section 128, is made final.

> Baltimore & O. R. Co., vs. Interstate Commerce Com., 216 U. S. 216. 30. Sup., Ct., Rptr., 86, 87.

Section 240, of the code, as we construe it, authorizes this court to exercise a supervisory control over the court of appeals, in all cases made final, by the well known common law remedy of certiorari.

This section clearly recognizes, and emphasizes, the fact that appeal does not lie to this court from any judgment or decree of the court of appeals, in any suit or action where the jurisdiction of the lower court is dependent upon diverse citizenship.

Section 241, of the code, confirms our construction of section 128. This section gives the right of appeal from the judgments and decrees of the court of appeals to this court, only in case where such judgments or decrees are not made final by said section 128, in cases only where the matter in controversy shall exceed one thousand dollars besides costs.

It is evidently under the provisions of this section that appellants have filed the affidavit of H. S. McGowan, showing that the matter in controversy exceeds such sum. We submit this last section, 241, applies only to judgments and decrees in suits not made final by section 128.

That the decree of the Circuit Court of Appeals in this cause is final and not appealable seems to be the construction placed upon these statutes by this court.

American Const. Co. vs. Jacksonville, etc. Co., 148 U. S. 372, 13 Sup. Ct. 762.

Empire Etc. Co. vs. Hanley, 198 U. S. 291, 25 Sup. Ct. 691-2.

Mc Fadden vs. U. S. 213, U. S. 288, 29 Sup. Ct. 490.

Arbuckle vs. Blackburn, 191 U. S. 413, 24 Sup. Ct. 148.

Ayres vs. Polsdorfer, 187 U. S. 585, 23 Sup. Ct. 196.

Bagley vs. Gen. Fire Extinguisher Co., 212 U. S. 477, 29 Sup. Ct. 341.

Weir vs. Rountree, 216 U. S. 607, 30 Sup. Ct. 418.

City & County of Denver vs. N. Y. Trust Co., 229 U. S. 123, 33 S. Ct. 657.

McCormick vs. Oklahoma City, 236 U. S. 657. 35 S. Ct. 455.

Filing a cross bill does not change situation, where the original jurisdiction was dependent upon diverse citizenship, even though broader than the original bill, and relief is asked upon federal grounds.

Denver vs. N. Y. Trust Co., 229 U. S. 123, 33 S. Ct. 657.

The decision of the circuit court of appeals,

dismissing a case for want of jurisdiction is final, from which there is no appeal.

Kingman & Co. vs. Western Mfg. Co., 170 U. S. 675, 18 S. Ct. 786.

We assume it will not be disputed that the complaint clearly shows the jurisdiction of the Circuit Court is dependent entirely upon diverse citizenship.

We therefore most respectfully submit that the appeal be dismissed.

C. W. FULTON,
Solicitor for Apellee.

In the Supreme Court of the United States

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,
Appellants

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a Corporation,
Appellee

No.....

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The appellee, as plaintiff, instituted this suit in the United States District Court for the Western District of Washington, Southern Division, for the purpose of enjoining the appellants from placing and maintaining fixed structures in the waters of the Columbia River in front of that portion of Sand Island known and designated as "Sites numbered 2 and 3," between the line of ordinary low water and line of navigability of such river. Sand Island above referred to is the same island referred to in the decision rendered by this Court in the case of the State

of Washington vs. State of Oregon, decided November 16, 1908.

211 U. S. 127, 214 U. S. 215, 29 Sup. Crt. Rep. 47, 631.

The suit was instituted prior to the rendition of that decision. As a matter of fact, all of Sand Island, including said sites and waters fronting thereto, was situated entirely outside of the boundary lines of the State of Washington and exclusively within the territorial boundaries of the State of Oregon. But prior to the decision above mentioned, the State of Washington and its officials had at all times claimed and actually exercised exclusive jurisdiction over Sand Island up to the middle of the channel South thereof. And claimed that the boundary line dividing the State of Washington from the State of Oregon was the middle of the channel which washed the shores of Sand Island on the South. The officials of the State of Washington exacted from all persons operating fixed appliances in that vicinity and in such territory Washington licenses, and required from all persons operating any fixed appliance in that vicinity a license from the State of Washington, and such had been the case for time immemorial.

The island in question was reserved from sale for military purposes by virtue of a proclamation issued by President Lincoln, August 29, 1863 (Appellee's Exhibit "A"), and has since been owned in fee by the United States.

On October 21, 1864, Special Laws of Oregon 1864, a copy of which is attached to this brief, the State of Oregon by special act granted to the United States all the tidelands surrounding and adjacent to Sand Island and bordering thereon. Since that time,

the United States has been the owner of such tidelands. In the year 1905, the Secretary of War adopted the policy of leasing portions of the shore and frontage of said island to local fishermen, pursuant to the Act of July 28, 1892 (United States Compiled Statutes, 1901, pp. 25, 29, 30). In fact, leased the sites in question to the appellant H. S. McGowan during the years 1905, 1906 and 1907.

In the beginning of the year 1908, the Secretary of War advertised for bids for these sites. The appellant H. S. McGowan and appellee were rival bidders. The appellee was the highest bidder. Thereupon, the Secretary of War leased the two sites in question to the appellee under a written lease (Plaintiff's Exhibit "E"), for the period of three years, commencing May 1, 1908, and terminating on the 30th day of April, 1911.

In the early part of June, 1908, the appellee entered upon the premises for the purpose of seining for fish. The seines contemplated to be used and which were used were employed in the usual manner as drag seines are ordinarily employed. The seine was carried out into the water and the same hauled in from both ends to the shore, and the fish there taken from the net. The appellants for the purpose of preventing the appellee from operating seines or any drag net or floating appliance from such island placed obstacles in front of the two sites in question at about the line of ordinary low water, making it impossible for the appellee to employ seines. The appellee thereupon brought this suit in the Federal Court of the State of Washington to enjoin appellants from placing such obstructions in front of such sites, believing at that time that Sand Island was within the territorial boundaries of the

State of Washington. Immediately upon the announcement of the decision of this Court in the case of State of Washington vs. State of Oregon, supra., the appellee by proper proceedings, reciting the facts above mentioned, suggested to the Washington Fedral Court the fact that Sand Island and the premises in controversy were not within the territorial boundaries of the State of Washington, or within the jurisdiction of such Court, and moved the Court to dismiss the suit without prejudice, so that the appellee could prosecute its suit in the State of Oregon. The lower Court, however, held that although Sand Island was in Oregon, and although appellee had been honestly mistaken as to the territorial boundaries of Washington, yet held it had jurisdiction in the premises and refused to dismiss the action. After the Court had announced its opinion in this regard, the appellee obtained a rule authorizing it to file a supplemental complaint. This supplemental complaint was accordingly filed September 10, 1910 (pg. 149, abstract), wherein it alleged the true facts, namely: That Sand Island was not within the territorial boundaries of the State of Washington; on the contrary, was within the exclusive jurisdiction of the State of Oregon, and therein alleged the facts hereinbefore mentioned, namely: That up to the announcement of the decision of this Court in the State of Washington v. State of Oregon, supra., the State of Washington and its officials had at all times claimed that said Sand Island was within the boundaries of Washington and exercised exclusive jurisdiction over such Island and waters surrounding the same and had taken entire charge of all the fishing industries there which had been operated for many years; and that the State of Oregon and offi-

cials thereof had universally acquiesced in the actions of the officials of the State of Washington, and the general public entertained the belief that Sand Island was a part of Washington territory. That believing such to be the fact, the suit was instituted, and thereupon suggested to such Court that it was without jurisdiction and asked for a dismissal of the suit. This request was denied. The case was then tried before the Federal Court in Washington, resulting in a decree against appellee and in favor of the appellants. From the final decree entered in that suit, the appellee prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit. Among other propositions, urged before that Court the claim that the Court below did not have jurisdiction because of the fact that the premises in controversy were not within the jurisdiction of the State of Washington, but were wholly within the territorial jurisdiction of the State of Oregon, and that this suit was instituted under the mistaken belief that the premises in controversy were in Washington accordingly as heretofore suggested. This contention on the part of the appellee was sustained by the United States Circuit Court of Appeals, and a decree was entered dismissing the cause upon that ground, and upon such ground alone (134 C. C. A. 401). From this decree, the appellants, who were defendants in the Court below, have prosecuted an appeal to this Court.

The only question before this Court is the above mentioned question of jurisdiction.

POINTS AND AUTHORITIES

I.

The lower Court was without jurisdiction over

the cause of suit set forth in the bill of complaint, and was without jurisdiction over the cause of suit set forth in the cross-bills filed herein by the appellants.

Neither the cause of suit set forth in the bill of complaint, nor the causes of suit set forth in the cross-bills filed by the appellants, arose within the State of Washington or on the Columbia River, within the meaning of the acts admitting the States of Oregon and Washington into the Union, or the enabling acts of either, or the constitution of either of such states.

Act of Congress, May 2, 1853, 10 Stat. at Large, 172, Chap. 90.

Act of Congress, Feb. 14, 1859, 11 Stat. at Large, 383, Chap. 33.

M. & M. R. R. Co. v. Ward, 67 U. S. 485.

Wood v. Marietta Chair Co., 158 U. S. 105.

North Ind. R. R. Co. v. Mich. Cent R. R. Co., 15 How. 233.

Atlantic Dredging Co. v. Berger Neck Co., 44 Fed. 208.

Evansville Traction Co. v. Hudson Bridge Co., 133 Fed. 973-4.

12 A. & E. Ency. Pldg. & Prac. 135.

Neilson v. Oregon, 29 Sup. Crt. Rep. 383.

Gilbert v. Moline Water Power Co., 19 Iowa 319.

Roberts v. Fullerton, 117 Wis. 222.

Pomery's Equity Jurisprudence (3d Ed.), § 1318.

In re. Mattson, 69 Fed. 535.

Ex Parte Desjiero, 152 Fed. 1004.

II.

While properly not involved in this case, the doctrine contended for by the appellee in the Court below, namely, that the exclusive right of ingress to and egress from the premises for the purpose of operating seines has since been affirmed by the Supreme Court of Oregon in two recent and important cases, to-wit:

Eagle Cliff Fish Co. v. McGowan, Ore.
Johnson v. Jeldness, et al, (Not reported).

ARGUMENT

WE RESPECTFULLY SUBMIT THAT THE LOWER COURT WAS WITHOUT JURISDICTION OF EITHER THE CAUSE OF SUIT ALLEGED IN THE BILL OF COMPLAINT OR EITHER OF THE CAUSES OF SUIT ALLEGED IN THE CROSS BILLS FILED BY THE DEFENDANTS.

As we have stated, after the decision in the case of State of Washington v. State of Oregon, 29 Sup. Ct. Rep. 47, 631, and before any evidence was taken, or costs incurred, the appellee, by motion, suggested to the court below that it was without jurisdiction of either the cause of suit alleged in the bill of complaint or in the cross bills filed by appellants.

This motion was duly presented and submitted before any evidence was taken or costs incurred, and by the court overruled. Appellee then obtained a rule permitting it to file a supplementary complaint, which it filed, alleging that the premises in controversy were entirely without the jurisdiction of the lower court and entirely within the territorial boundaries and jurisdiction of the State of Oregon.

That at the time the suit was instituted appellee was informed and believed that such premises were within the boundaries of the State of Washington. That the State of Washington had at all times exercised exclusively jurisdiction over such premises, and fishing appliances employed thereon, but that by decree of the Supreme Court of the United States, in the case above mentioned, the premises were held to be within the boundaries of the State of Oregon.

The appellants filed an answer to this supplementary complaint, denying the allegations thereof, and contending that the premises were in the State of Washington.

The evidence shows the premises lie wholly without the boundaries of Washington and entirely within the State of Oregon. Therefore, we respectfully submit that the Court of Appeals had no jurisdiction to enter any decree herein other than to dismiss this suit, which it did.

We believe the most cursory examination of this question will convince the court of the correctness of our contention.

It has always been a serious question in the minds of the lawyers of the State of Oregon and the judiciary as well as whether Washington has concurrent jurisdiction "in civil and criminal cases upon the Columbia and Snake Rivers." The act of Congress admitting her into the Union does not so provide. The Act of May 2, 1853, dividing the territory of Oregon and creating out of a portion of it, the territory of Washington, contains the following provision:—

"The territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all

offenses committed on the Columbia River, where said river forms a common boundary between said territories."

Nothing said there about the Snake or any river other than the Columbia, **and nothing about civil cases.**

The next act touching on the subject is that of Feb. 14, 1859, admitting Oregon into the Union. Section one of that Act, after describing the boundaries of the state, contains the following provision:

"Including jurisdiction in civil and criminal cases, upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this State."

Section two of same Act contains the following provision:—

"The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

It will be observed that the provision quoted from the act defining or establishing the concurrent jurisdiction of the territories of Oregon and Washington **applies in criminal cases only.** The Act of Feb. 14, 1859, after defining the north boundary line of Oregon, provides, "including jurisdiction in civil and criminal cases upon the Columbia and Snake Rivers concurrently with states and territories of which those rivers form a boundary in common with these states"; but this contains no provision for concurrent jurisdiction with new states, as does the provision in section two of the same act above quoted.

Since then Washington has been admitted into the Union, but the act admitting her makes no provision for the exercise by her of even the concurrent jurisdiction with which, as a territory, she was vested. But even if it shall be held that admitting her into the Union with area she occupied as a territory, carries with it the concurrent jurisdiction with which she, as a territory was vested, it would only apply to "offenses committeed on the Columbia River," and not to civil cases. It is true that the act admitting Oregon vested in her with "jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common" with her, and it may be well contended that such provision operate to vest concurrent jurisdiction in such states and territories, but it is to be observed that it is to Oregon and to her only that the "concurrent jurisdiction" is given. Her boundaries are described, and then, in addition to jurisdiction over that territory which would follow as a matter of course, it is provided, "**including** jurisdiction in civil and criminal cases" etc.; which was adding to her jurisdiction that which she otherwise would not have had. Washington was then a territory; Congress had power to extend or restrict her jurisdiction at will. It therefore said to Oregon, "we not only vest you with jurisdiction within your boundaries but also beyond your boundary line on the Columbia; there you shall exercise jurisdiction concurrently with Washington."

The provision in section one relative to "civil and criminal cases" did not vest in Oregon the power to regulate by legislation, matters arising on the river, hence the additional provision in said section two, granting to the State "concurrent jurisdiction

on the Columbia" etc. etc. Not "in civil and criminal cases" only, but "jurisdiction" generally, which probably included legislative power or jurisdiction "upon" the river. The language, however, is always "on" or "upon the river." These expressions are equivalent to "on the water." Indeed, in section 2, Act of 1859, the concurrent jurisdiction vested in Oregon is, as we have seen, "on the Columbia and all other rivers and Waters bordering on the said state of Oregon," etc.

SIMILAR PROVISIONS IN ACTS ADMITTING OTHER STATES

As stated by this Court in Nielson vs. Oregon, 29 Sup. Ct. Rep. 383, quoting "concurrent jurisdiction properly so called, on rivers, is familiar to our legislation." All the states bordering on the Missouri, Mississippi and other great rivers and waters, have similar provisions in their enabling acts. Numerous cases have involved the construction of such provisions, but in no case has it been held or even seriously considered, so far as we can discover, that such jurisdiction empowers the courts of one state to regulate or determine property rights in the bed or shores of rivers or waters within the boundaries of the opposite state. For instance, the provision in the Iowa enabling act is as follows:—

> "That the State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State of Iowa, so far as the said river, shall form a common boundary to said state and any other state or states" etc. 5 U. S. Statutes at Large, 742.

In Gilbert vs. The Moline Water Power and Mfg. Co., 19 Iowa 319, the Supreme Court of that

State held that an Iowa Court is without jurisdiction to abate a nuisance on the Illinois side of the river.

The defendant had "erected a dam across the south or slough channel of the Mississippi River" which was situated on the Illinois side of the river but opposite the premises of plaintiff in Iowa. In passing on the question, the court said:—

"Appellant bases the claim of jurisdiction upon the language of the acts admitting Illinois and Iowa into the Union, and the provisions of the Constitution and statutes of each in defining their respective boundaries. The act of 1818 (Ap. 18), admitting Illinois, gives to said state concurrent jurisdiction on the Mississippi river with any state or states to be formed west thereof, so far as the same shall form a common boundary. The act admitting Iowa contains the same provision as to concurrence of jurisdiction, Stat. at Large, 5,742. The statutes of Illinois recognize the same extent of jurisdiction; and in this state it is declared that our jurisdiction is concurrent on the waters of any river or lake which forms a common boundary between this and any other state. By our Constitution, our eastern boundary is "the middle of the main channel of the Mississippi river." Preamble Rev. 986.

Now, while it is, of course, not claimed that the laws of this State would have inherent authority beyond the jurisdiction of the State, or that our laws can bind or affect property out of or bevond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either State may direct the manner of its use, and order its removal or abatement if found to be of the character charged. That the Courts of Illinois might do this, there is, of course, no doubt. But the claim is, that

our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us.

There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made, and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property, by persons while **on the river,** or which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases were made to depend on the injury whether the boat or vessel was on one side or the other of the main channel, whether the injury was inflicted or crime committed east or west, or north or south, of such line, it can be readily seen that it would frequently be almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution, and hence the reason of making the jurisdiction concurrent in all such cases. Such property, and persons are, as a rule, transitory, moving—here today and gone tomorrow. Here is a common highway open to the citizens of all States and all nations. It is declared common territory, and, as to matter arising thereon, or persons found thereon, sovereignties on either side have common or concurrent jurisdiction. Not so, however, as to an obstruction where the property therein, and the use thereof, is wholly on one side of the channel. It is

as though as unhealthy, dangerous or illegal manufactory should be erected and continued on the Illinois shore, to the injury and annoyance of citizens on the Iowa side; and though such an erection should extend below low water mark, there would not be jurisdiction to declare its abatement in our Courts. Such injuries are not **on** the river with the purview of the acts referred to and relied upon by counsel. And this conclusion is the more warrantable, when we consider that in this case the main dam extends from the shore to the island (Rock Island) that this island containing hundreds of acres of land, is indisputably a part of the territory of our Sister state, and that to reach this obstruction or nuisance, our Courts and the officers thereof must go beyond this island and decree and procure the removal of a work attached to the main shore, and placed there, too, as we are bound to suppose, with the consent of the state to which the corporation owes its life."

It will be seen that the Court italicizes the words "on" and "on the river." Continuing, the Court refers to the case of the M. & M. Railroad Co. vs. Ward, 67 U. S. 485, to which we also invite the attention of the court in this case. The plaintiff in that case sought to abate a bridge across the Mississippi river by a suit prosecuted in the U. S. Circuit Court for the District of Iowa. The Supreme Court of the United States held that the Iowa Court was without jurisdiction to abate that portion of the bridge on the Illinois side of the boundary line. It is sufficient to quote from the decision of the 19 Iowa case above referred to, without quoting from the U. S. Supreme Court decision, in the bridge case. After stating that which we have quoted above, the Iowa Court continued as follows:—

"All room for doubt upon the subject, however, is, it seems to us, removed by the case of the M. & M. Railroad Co. vs. Ward, 2 Black 485. The object of the bill, in that case, was to abate the Rock Island bridge across the Mississippi river, and situated a few miles below the construction complained of in this case. The bridge extends entirely across the river and has its abutments on either shore. And yet it was there held that the nuisance complained of, being a bridge across the Mississippi river, where that river divides the States of Illinois and Iowa, and the State line being in the middle of the river, the District Court for Iowa has no power to abate the nuisance on the Illinois side, and that if the obstruc- it was created by piers erected on the Illinois side, that was an offense against the laws of Illinois, and neither a state court of Iowa or the Federal Court for the district, can inquire into the facts or furnish a remedy. Surely no case could be more decisive of the question involved in another, than this one is of that now before us. If this rule is correct when applied to a bridge, a large portion of which is indisputably within the limits of our state, there can be no room for controversy, when applied to a nuisance, every part of which is beyond the middle line which divides the states. And, indeed, that case carries the rule so far, that it might be overruled without substantially affecting the merits of the present controversy."

The doctrine announced by this Court in M. & M. Railroad Co. vs. Ward, has been cited and approved many times but never departed from and is unquestionably the law.

A more recent case and one clearly in point is that of Roberts vs. Fullerton, 117 Wisconsin 222. In

that case, the defendant, an officer of the State of Minnesota, had seized and destroyed plaintiff's fish net, located by him to catch fish and staked to the bottom of Lake Pepin, on the Wisconsin side of the boundary line, said lake being a boundary water.

Plaintiff's action was for damages for such seizure and destruction.

Defendant justified under the laws of the State of Minnesota, which he alleged in his answer, authorized his action. A demurrer to the answer was sustained by the trial court and the case was appealed by defendant. The act of Congress was similar to that in the Oregon enabling act, being as follows:—

"The said State of Wisconsin shall have concurrent jurisdiction on the Mississippi and all rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

The Wisconsin Supreme Court affirmed the ruling of the lower court and in passing on the question at pages 224-225 said:—

"The term, 'concurrent jurisdiction' does not imply, as the learned attorney general for the State of Minnesota seems to suppose, that the people of the two states in their sovereign capacities are joint owners of the bed of the Mississippi river within the scope of the enabling acts referred to, or of the waters of the river or the fish therein or things thereon, under the principle laid down in Rossmiller vs. State 114 Wis. 169, 89 N. W. 839. Ownership in that sense does not follow jurisdiction as the term was used in the enactments under discussion. It was competent for the national legislature in the forma-

tion of the states, to extend the laws of each for certain purpose over territory of the other. That being done, the jurisdiction **on** boundary waters being extended as to each state from shore to shore, while the boundary line between them was placed at the main channel of the river. That necessarily forms the boundary between them as to sovereign rights of ownership. Sovereign rights as regards ownership, of the bed of the Mississippi or anything permanently affixed thereto coincides with the territorial boundaries. Therein, as to everything of a tangible character forming part of the land, whether above the water or below the water, the jurisdiction of each state is exclusive."

And at page 228, the Court said:—

"The meaning of the language of the federal law giving concurrent jurisdiction on the waters of a boundary river is to be restrained to the purposes thereof. For all other purposes the jurisdiction of each state on its side of the main channel of the river is exclusive. For examples; one State can neither authorize nor abate a permanent object in the river within the territory of the other; it cannot tax property either in the river or on the river on the opposite side of the main channel thereof."

At page 230, the Court said:—

"However, we cannot come to the conclusion that 'concurrent jurisdiction' was used by Congress in the broad sense of the whole sovereign authority. That would be inconsistent with the decision of the federal court in Mississippi & M. R. Co. vs. Ward, 2 Black 485, as we have seen. It held, in a situation similar to the one involved here as regard the concurrent power of two states, that a permanent ob-

ject in the river on one side of the main channel thereof, being wholly within the territorial limits of the state on that side, is subject to judicial control solely by the Courts of and for such state. Following that, as we have seen, courts have universally held that the words 'concurrent jurisdiction on' the river have reference to violation of law on the waters of the river actually or constructively. In Buck vs. Ellenbolt, 84 Iowa 394, —51 N. W. 22, it was held that the effect of Mississippi & M. R. Co. vs. Ward was to restrict the words 'concurrent jurisdiction' to actions in some way connected with the navigation of the river,—things on the river."

At page 235, the Court said:—

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi subject to the laws of the state of Minnesota? There is no escaping the conclusion that if such is the case it is competent for that state to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the State of Michigan to extend its laws on Lake Michigan on the same subject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the

territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully invoked to justify interference by one state or country with the enjoyment of the right to fish within the territorial boundaries of the others. It would be foreign to the necessities of the case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislature enactment to govern the fishery rights of the people in a foreign jurisdiction."

Applying the doctrine of the above cases to the case at bar, it seems clear that a Washington court is without jurisdiction to proceed therewith. That the pending case is of a local character, the decisions and authorities cited in the argumented heretofore made, clearly show. This Court in M. & M. Railroad Co., supra., denied jurisdiction to the Iowa Court over that part of the bridge in Illinois, because the subject matter was in the latter state. Here appellee sought protection of its right to land seines on that part of Sand Island to which it had a lease. Appellants had planted obstructions in front in such manner that it could not operate its seines. If appellee had a lease to that portion of Sand Island as alleged, then it was entitled to an injunction restraining appellants from interfering with such right to draw seines and land the fish taken, on Sand Island. The appellants contend that, by virtue of licenses from the state of Washington, they are authorized to locate and main-

tain their set nets in front of that island. But the entire **locus in quo** is in the state of Oregon. Whatever right the appellee had to the use of the premises between its lands and the channel of the river depends entirely on the laws of Oregon. Before the lower court could proceed with the case, it was necessary to determine first, with what rights or interests is the appellee vested in Sand Island, and, if it appears that it has a lease as alleged, and that it is a valid one, then, second, under the laws of Oregon what rights has the appellee, as such bank and shore owner, in and to the use of the frontage?

Suppose a case where the owner of tide land on the south shore of the Columbia River was seeking to restrain a person from driving piling or erecting other obstruction in front of such tide land. Would a Federal Court in Washington have jurisdiction of the cause? Certainly not, and yet such case would be in all respects the same as this one.

We take it that "concurrent jurisdiction" in civil cases contemplates cases arising on the water where it might be difficult to determine in which jurisdiction the cause of action arose, as for instance, actions for personal injury resulting in the death of the injured party, the action being provided for by the statute. In such case the injury must have occurred within the territorial jurisdiction of the state, the statute of which is invoked. We have long been of the opinion, also, that it contemplates the right in each state to have its process in civil cases served any place on the water, though we admit that we can find no authority sustaining that view. So far as we have been able to ascertain, the courts hold that it applies only to cases arising on the water, such as we have instanced.

But, as above stated, we are confident no case can be found that supports the view that a court of one state can adjudicate property rights of parties arising out of claims of title to or the right to use or occupy certain premises, shore lands or locations in the river beyond the boundary line of such state. Such actions are local as clearly as if the premises were entirely on upland. That portion of the bed of the river within the boundary line of a state, is as distinctly a part of its territory over which its jurisdiction is exclusive, as the uplands within its borders.

In this case, appellee bases its right to recover, on its ownership to land above the high tide, on Sand Island; that island being as distinctly and absolutely Oregon territory as any of the upland south of the river. The action of appellants, if appellee's allegations are true, is a trespass on the appellee's premises, on its property rights in Sand Island and the shore thereof. How could a Federal Court of Washington enjoin that trespass? Its process cannot guard the rights of persons in or to property beyond the boundaries of the State of Washington. It cannot send its officers into the State of Oregon to remove obstructions to the enjoyment of real estate in that jurisdiction. It is difficult to define the term "concurrent jurisdiction," as it is employed in these statutes, but it is not difficult, we respectfully submit, to see and understand that it has no application to and does not include jurisdiction in a case such as this.

This question has been determined by the Federal courts of both Washington and Oregon. We refer to the case of In re. Mattson, decided July 22, 1895, 69 Fed. 535 et seq. The facts in that case were that the petitioner Mattson was operating a pound net fish trap in the waters of the Columbia River

north of the middle channel thereof, and entirely within the territory of the State of Washington, under a license from the State of Washington. Oregon claiming to act under the concurrent provisions of the Act of Congress admitting it into the Union enacted a law prohibiting pounds nets to be operated on Sundays. Mattson operated this trap on Sunday. He was indicted by the Grand Jury of Clatsop County, Oregon, charged with the crime of violating the above statute and was tried before the court there and convicted. He then prosecuted a petition for a writ of habeas corpus before the United States Circuit Court for Oregon. The matter being of considerable interest to both states, by request the Honorable C. H. Hanford, then United States District Judge for Washington, sat on the bench with the Oregon Justice, C. B. Bellinger, and the case was argued before the two judges, and it was there held that Oregon had no jurisdiction over a pound net fish trap erected beyond its territorial limits even though in the waters of the Columbia River.

It occurs to us this is decisive of this case. An examination of the pleadings will disclose this state of facts. The appellants base their sole right to operate a fixed appliance placed upon the bed of the Columbia River within the territorial boundaries of Oregon exclusively upon licenses issued to them by the Fish Commissioner of the State of Washington. This is their sole and only defense. They have no other defense. Therefore, if the Fish Commissioner of the State of Washington had no authority to grant a license beyond the territorial boundaries of his state, the appellants certainly had no locations whatever.

Section 5294, Lord's Oregon Laws, provides as follows:

"It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine, or any device or apparatus or gear used in catching salmon fish or sturgeon without first obtaining from the Fish Warden a license therefor as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)"

Suitable penalty is provided for violation of the act. Therefore, the lower court had no jurisdiction over the cause of action, and the complaint, together with the answer of appellants and their cross-bills, clearly shows that the court was absolutely without jurisdiction.

It is true, that in a suit decided by the Supreme Court of Oregon hereinafter discussed, namely, Eagle Cliff Fishing Co., v. H. S. McGowan, et al., that court held the lower court had jurisdiction of the said causes of suit and counter claims. But this decision was based wholly upon the allegations in the bill of complaint and answers and cross complaints, that the premises in controversy were situate in the State of Washington. The correctness of such decision so founded upon the record in that case cannot be denied.

We do not question but that allegations of the complaint and cross-bills show the lands to be in Washington; but in this case, the record shows such

lands to be in Oregon. Such being the admitted fact, we believe the lower court was without jurisdiction.

We, therefore, respectfully submit that the decree of the lower Court should be affirmed.

C. W. FULTON,
Solicitor for Appellee.

McGOWAN ET AL. *v.* COLUMBIA RIVER PACKERS' ASSOCIATION ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 78. Argued November 22, 23, 1917.—Decided December 17, 1917.

As decided by this court in *Washington* v. *Oregon*, 211 U. S. 127; 214 U. S. 205; Sand Island, in the Columbia River, is part of the State of Oregon, the boundary between that State and Washington being the ship channel north of the Island.

An alleged nuisance consisting of nets connected with buoys and heavily anchored to the bottom of the Columbia River between the line of extreme low tide and the channel, in Oregon,[1] is not subject to abatement by the District Court sitting in the Western District of Washington; assuming that concurrent jurisdiction "on the Columbia" is enjoyed by the State of Washington in virtue of the act organizing Washington Territory (c. 90, § 21, 10 Stat. 179) and the act admitting Oregon into the Union (c. 33, § 2, 11 Stat. 383), such jurisdiction does not reach the bed of the stream in Oregon.

Plaintiff filed its bill in the Western District of Washington to abate a nuisance on the Columbia River, assuming *bona fide* and not without some reason that the *locus in quo* was within that State and District, but later, before taking proofs and before final hearing, moved to dismiss without prejudice because of an intervening decision of this court which fixed the *locus* in Oregon. The motion having been refused and the case retained upon the ground that Washington had concurrent jurisdiction over the River, *held*, (1) that, in face of the doubt concerning the power to abate the nuisance as prayed, the District Court erred in refusing the motion, and (2) that the possibility of granting relief against the defendants *in personam* did not justify retaining the case, against the plaintiff's will.

When a decree dismissing a bill is meant to be without prejudice, the better practice is to express it so.

219 Fed. Rep. 365, affirmed.

THE case is stated in the opinion.

[1] The place was on the south side of Sand Island.

Mr. Bert W. Henry, with whom *Mr. Franklin T. Griffith*, *Mr. R. A. Leiter* and *Mr. Harrison Allen* were on the brief, for appellants:

Besides diverse citizenship, the amended bill showed on its face that federal questions were involved. It based the alleged right to exclusive fishery upon the government ownership of the premises and the lease thereof from the Secretary of War. To sustain this contention requires a construction of the President's proclamation withdrawing the Island and a definition of the powers of the Secretary under the act of Congress authorizing leases (27 Stat. 231), as well as a determination of the question of fact whether or not, as also is alleged, defendants' nets were placed in the waters in violation of the Constitution and laws of the United States prohibiting the obstruction of navigable waters. The case is like *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526. See also *Wilson Cypress Co.* v. *Enrique Del Pozo y Marcus*, 236 U. S. 635; *Doolan* v. *Carr*, 125 U. S. 618; *Cummings* v. *Chicago*, 188 U. S. 410. Jurisdiction of this court exists also because the jurisdiction of the trial court was involved.

The clause relative to concurrent jurisdiction on the Columbia and other boundary waters in § 2 of the act admitting Oregon as a State appears also in the acts admitting the States bordering upon the Mississippi River and its tributaries. It is undoubtedly a grant of jurisdiction, not only to the courts, but to the legislative and executive departments as well. This court recognized the concurrent jurisdiction of the courts of Oregon and Washington on the Columbia. *Nielsen* v. *Oregon*, 212 U. S. 315. The federal court for Oregon and the Supreme Court of that State have done likewise. *In re Mattson*, 69 Fed. Rep. 535; *State* v. *Nielsen*, 51 Oregon, 588.

The concurrent jurisdiction so granted is *on* the river, and does not include jurisdiction of its bed. *McFall* v. *Commonwealth*, 2 Metc. 394; *Carlisle* v. *State*, 32 Indiana,

55; *Sherlock* v. *Alling*, 44 Indiana, 184; *Gilbert* v. *Moline Water Power Co.*, 19 Iowa, 319; *State* v. *Mullins*, 35 Iowa, 199; *State* v. *Metcalf*, 65 Mo. App. 681; *Memphis C. & P. Co.* v. *Pikey*, 142 Indiana, 304; *Opsahl* v. *Judd*, 30 Minnesota, 126; *Roberts* v. *Fullerton*, 117 Wisconsin, 222; *State* v. *Moyers*, 155 Iowa, 678. It was undoubtedly the intention of Congress in granting such concurrent jurisdiction that acts on the river should be within the jurisdiction of either State. Congress undoubtedly intended also that objects of a permanent nature, which are affixed to or are a part of the bed should not be subject to the grant. Such objects are a part of the real estate, or their location is fixed and permanent so that no question can arise in regard to the State where they are located. There is no need for concurrent jurisdiction over such objects, for they are always in the same place; and so it is that objects which float upon the water, or which move about in the water, and which rest in part on the bed of the stream and in part upon the water, and all rights and liabilities in connection therewith, are within the grant of concurrent jurisdiction, while the bed of the river, together with all permanent structures built upon or into it, are not.

Counsel then described the set nets in question, showing that they must be taken from the water whenever fish were removed and are in no sense attached to or part of the river bed, but are subject to be moved from place to place, and, when anchored, are no more affixed than are boats when at anchor. Such objects, they contended, were peculiarly within the purpose of the grant of concurrent jurisdiction as explained by the courts.

The regulation of the fishing industry is also peculiarly within the grant. How are the two States to enforce their policy of maintaining that industry, if the execution of their laws depends on proof in each case that the act complained of was on one side or the other of the invisible state line? And how are fishermen to enjoy their

rights under either State without danger of exceeding them?

The trial court had jurisdiction of this suit by reason of its jurisdiction over the parties, regardless of the *situs* of the property. *Massie* v. *Watts*, 6 Cranch, 148; *Muller* v. *Dows*, 94 U. S. 444; *Phelps* v. *McDonald*, 99 U. S. 298; *Cole* v. *Cunningham*, 133 U. S. 107; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Robertson* v. *Howard*, 229 U. S. 254; *Louisville & N. R. Co.* v. *Western Union Telegraph Company*, 207 Fed. Rep. 1; *Jennings* v. *Beale*, 157 Pa. St. 630; *Schmaltz* v. *York Mfg. Co.*, 204 Pa. St. 1; *Kirklin* v. *Atlas S. & L. Assn.*, 60 S. W. Rep. 149; *Allen* v. *Buchanan*, 97 Alabama, 399; *Steele* v. *Bryant*, 116 S. W. Rep. 755.

Mr. G. C. Fulton, with whom *Mr. C. W. Fulton* was on the brief, for appellees:

The jurisdiction of the trial court was dependent entirely on diverse citizenship and the case therefore is not reviewable here by writ of error.

Assuming that the State of Washington fell heir to the concurrent jurisdiction on the Columbia which was given to the Territory by the organic act, such jurisdiction, by the terms of that act, was limited to criminal offenses committed on the river. The act admitting Washington as a State, however, does not purport to grant even that measure of concurrent jurisdiction, and the earlier act admitting Oregon grants concurrent jurisdiction to Oregon alone. In any case, the grant is of jurisdiction "on" or "upon" the river. All the States bordering on the Missouri, Mississippi and other great rivers and waters have similar provisions in their enabling acts. Numerous cases have involved the construction of such provisions, but in no case has it been held or even seriously considered that such jurisdiction empowers the courts of one State to regulate or determine property rights in the beds or shores of rivers or waters within the boundaries of the opposite

State. See *Gilbert* v. *Moline Water Power Co.*, 19 Iowa, 319; *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485; *Roberts* v. *Fullerton*, 117 Wisconsin, 222. The present case is within these authorities. The action is local, the *locus* is in Oregon, and hence the Washington court had no power to proceed. It could not send its officers into Oregon to remove the obstructions complained of.

Appellants base their right to operate appliances fixed to the bed of the river in Oregon solely upon licenses issued by the Fish Commissioner of Washington. But Washington had no power to license such acts beyond her boundaries. *In re Mattson*, 69 Fed. Rep. 535. To be lawful in Oregon they must be licensed by Oregon under her law. Laws 1901, p. 338.

The trial court was without jurisdiction and the decree of the court below should be affirmed.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the appellee, the Columbia River Packers' Association, as lessee from the United States of fishing sites and riparian rights on Sand Island in the Columbia River, to compel the appellants to remove certain obstructions placed by them upon the bottom of the channel of the river in front of the plaintiff's premises, and to refrain from longer maintaining them there. Upon a bond being given a restraining order was issued on July 7, 1908; answers and a cross-bill were filed in the following August, and a demurrer to the cross-bill was overruled on October 21 of the same year. The suit had been brought in the Western District of Washington upon the belief that Sand Island was in Washington and subject to the jurisdiction that that State exercised in fact. But on November 16, 1908, it was decided by this court that the boundary between Oregon and Washington was the ship channel north of Sand Island, and that Sand Island belonged to the former State. *Washington* v.

Oregon, 211 U. S. 127; *s. c.* 214 U. S. 205. Thereupon, in June, 1909, the plaintiff filed a petition that the suit be dismissed without prejudice for want of jurisdiction, since it turned out that the land concerned was not within the district for which the court sat.

The District Court dismissed the petition and retained jurisdiction of the cause on the ground that by the Act of Congress of March 2, 1853, c. 90, § 21, 10 Stat. 172, 179, organizing the Territory of Washington, and by the Act of February 14, 1859, c. 33, § 2, 11 Stat. 383, admitting Oregon into the Union, concurrent jurisdiction on this part of the river was reserved to Washington, when it subsequently became a State. The plaintiff then filed a supplemental bill in which again it prayed that the suit might be dismissed without prejudice if the court had no jurisdiction; the case proceeded to the taking of evidence and final hearing, the temporary injunction was dissolved, an injunction was issued against the plaintiff's interfering with the defendants' appliances, and a final decree for damages caused by the temporary injunction was entered in favor of the defendants. The plaintiff appealed to the Circuit Court of Appeals, and that court, being of opinion that the bill should have been dismissed on the plaintiff's petition, reversed the decree and ordered the bill to be dismissed. 219 Fed. Rep. 365. 134 C. C. A. 461.

The nuisance complained of consisted of set nets, each anchored by a stone weighing about three hundred pounds to which was attached a short cable which was clamped to a wire rope about twenty-five feet long, to which in its turn was attached a buoy of large timbers. The nets were placed between the line of extreme low tide and the channel of the river; they were alleged to interfere with the exercise of the plaintiff's rights, and an abatement of the obstruction was prayed for in the bill. We agree with the Circuit Court of Appeals that, assuming for the pur-

poses of decision that the State of Washington had concurrent jurisdiction "on the Columbia," in the words of the statute (1859, c. 33, § 2), *Nielsen* v. *Oregon*, 212 U. S. 315, 319, the jurisdiction did not extend to the removal of such a nuisance as this. It did not reach the bed of the stream, and the officers of the State would have had no authority to intermeddle with the defendants' nets anchored to the bottom. See *Wedding* v. *Meyler*, 192 U. S. 573, 585. This was an important part of the relief that the plaintiff sought and when it found that it could not have it, it naturally endeavored to dismiss the bill.

It ordinarily is the undisputed right of a plaintiff to dismiss a bill before the final hearing. *Carrington* v. *Holly*, 1 Dickens, 280. *Cummins* v. *Bennett*, 8 Paige, 79. *Kempton* v. *Burgess*, 136 Massachusetts, 192. The discussions have been directed more to the question of costs. When a bill was filed under a mistake common to both parties and in other like cases the plaintiff was allowed to dismiss his bill without costs. *Lister* v. *Leather*, 1 DeG. & J. 361, 368 (1857). *Broughton* v. *Lashmar*, 5 My. & Cr. 136, 144 (1840). Here the decision of this court put the plaintiff in an unexpected position. The question before the District Court was not whether the bill ought to be retained for a decree *in personam* if the plaintiff so desired, or even one of costs, but whether it should be retained against the plaintiff's will for a trial that could not, or at least very possibly might be held unable to, give it what it asked. Upon this point also we are of opinion that the Circuit Court of Appeals was right. Its decree of course meant that the bill was dismissed without prejudice, as prayed, but it is better that it should express the fact and with that modification it is affirmed.

Decree affirmed.